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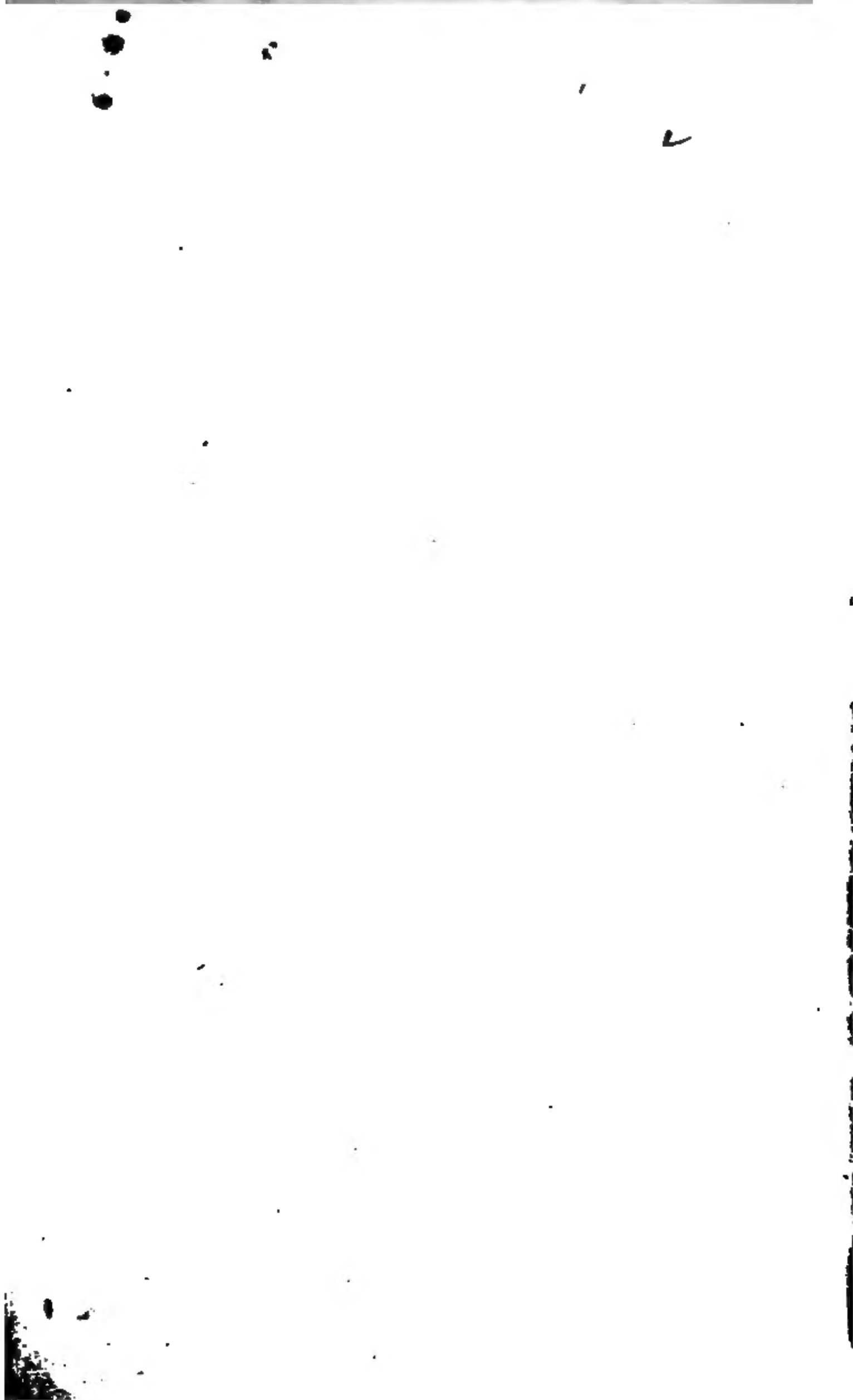
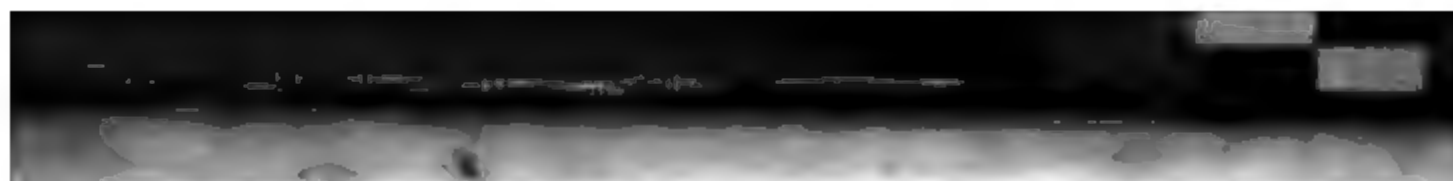
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.
VOL. II.

R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.

**WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.**

BY
RICHARD VAUGHAN BARNEWALL, of LINCOLN'S INN,
AND
EDWARD HALL ALDERSON, of THE INNER TEMPLE, ESQRS.
BARRISTERS AT LAW.

V O L. II.
Containing the Cases of MICHAELMAS, HILARY, EASTER, and TRINITY
Terms, in the 59th Year of GEORGE III. 1818, 1819.

L O N D O N :
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY ;
FOR J. BUTTERWORTH AND SON, LAW-BOOKSELLERS, 43. FLEET-STREET ;
AND J. COOKE, ORMOND-QUAY, DUBLIN.
1819.

THE COURT OF COMMONS

IN PARLIAMENT ASSEMBLED

THE PETITION OF

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J U D G E S
OF THE
C O U R T O F K I N G ' s B E N C H ,

During the Period of these REPORTS.

Sir CHARLES ABBOTT, Knt. C. J.

Sir JOHN BAYLEY, Knt.

Sir GEORGE SOWLEY HOLROYD, Knt.

Sir WILLIAM DRAPER BEST, Knt.

ATTORNEY-GENERAL.

Sir SAMUEL SHEPHERD.

SOLICITOR-GENERAL.

Sir ROBERT GIFFORD.

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ERRATA.

In *Stoefeld v. Brewin*, the marginal note should be as in the *Index*, under
PLEADING, 5.; and PRACTICE, 1.

In Vol. I. p. 606. line 10. *for executor read escrow.*

C A S E S

1818.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Fifty-ninth Year of the Reign of GEORGE III.

MEMORANDA.

IN the course of this vacation, Lord *Ellenborough* resigned the office of Chief Justice of this Court, where he had presided since *April*, 1802. He was succeeded by

Sir *Charles Abbott*, Knight, one of the Judges of this Court, who was sworn into his office before the Lord High Chancellor on the 4th day of *November*, and took his seat as Chief Justice on the first day of this term.

Sir *Vicary Gibbs*, Knight, having also resigned the office of Chief Justice of the Common Pleas, was succeeded by

1818.

Sir *Robert Dallas*, Knight, (one of the Judges of that Court,) who was sworn into his office before the Lord High Chancellor, on the 5th day of *November*, and took his seat as Chief Justice on the first day of this term.

On the first day of this term, the following gentlemen took their places within the bar, as his Majesty's counsel, learned in the law,

Archibald Cullen, Esq. of the *Middle Temple*.

William Owen, Esq. of *Lincoln's Inn*.

William Wingfield, Esq. of *Lincoln's Inn*.

William Horne, Esq. of *Lincoln's Inn*.

George Heald, Esq. of *Gray's Inn*.

Friday,
Nov. 6th.

WILSON *against* JOHN MILLER DICKSON, JAMES PATTERSON, and JOHN WILLIAM DICKSON. (a)

In an action against several defendants, as ship-owners, for damage sustained by the loss of goods laden on board their ship, it was

ACTION against the defendants, as ship-owners.

The declaration was in tort, and stated, that the plaintiff had shipped goods on board defendants' ship, to be delivered at *Senegal*; that defendants received the same for that purpose, yet that they did not deliver

held that by the 53 G. 3. c. 159. s. 1., they were not liable in that character beyond the value of the ship and freight due or to grow due, although the loss was occasioned by the misconduct of one of the defendants, who was both master and part-owner; and,

Secondly, That the value of the ship was to be calculated at the time of the loss, and not at the time of the commencement of the voyage; and,

Thirdly, That in calculating the value of freight due or to grow due, money actually paid in advance was to be included.

(a) The Judges of this court sat at *Serjeants' Inn*, on *Monday* the 26th of *October* and succeeding days, and heard this and several of the following cases argued by counsel, and delivered their opinions as upon former occasions, (see Vol. I. p. 1.); and the Court afterwards gave judgment on the day on which the cases are now reported.

them

them, and that the goods were, by their negligence, lost to the plaintiff. There was also a count in trover. Plea not guilty. At the trial of the cause, before Lord *Ellenborough*, at the sittings after *Michaelmas* term, 1816, a verdict was found for the plaintiff, damages 20,000*l.*, subject to the award of an arbitrator, who ordered the damages to be reduced to the sum of 3196*l.* 10*s.*, subject to the opinion of the Court, upon three points; and those points having been stated, the Court were pleased to direct, that they should come on for argument in the form of a special case, the facts of which were stated in the award as follows.

The defendants were joint owners of the ship *Hope*, which on the 19th day of *October*, 1814, was chartered by memorandum, not under seal, to the plaintiff, by the defendant, *Patterson*, therein described as master and part-owner, on a voyage to the coast of *Africa* and back; the ship was to proceed to such ports there as the plaintiffs should direct, the charter containing a stipulation, that the freight was to be so much *per* ton, register measurement *per* calendar month, two months' freight to be paid on the day the ship should depart from *Gravesend*, in prosecution of the voyage. The plaintiff, in pursuance of this charter-party, shipped goods to a very considerable amount, and directed them to be carried to *Senegal* and *Goree*. The ship, in prosecution of the voyage, sailed from *Gravesend*, on the 7th day of *November*, 1814, and two months' freight, amounting to 456*l.* 10*s.*, was then paid. On the 8th day of *January*, 1815, the ship was captured by an *American* privateer, and plundered of several parts of her cargo and ship's stores; the captors took out all the crew except the master and his son, and placed a prize-

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master and seven men on board her, with orders to carry her to *Salem*, in the United States; but a gale of wind coming on, which made it doubtful whether she would be able to reach *America*, the captain prevailed on the prize-master to bear up for *Bermuda*, on the promise that he and his men should not be made prisoners. On the 22d of *February* she made *Bermuda*, into which she was conducted by his Majesty's ship *Ganymede*, who instituted proceedings in the Admiralty Court there for salvage, and obtained a decree for one-sixteenth of the value of ship and cargo, for assistance, but not as salvage. On the 8th day of *March* the part of the cargo which had not been plundered by the *Americans* was sold at *Bermuda*. The ship was afterwards repaired, and took in a cargo for *Liverpool*, for which the captain received a considerable freight. At the trial, it was endeavoured to be shewn on the part of the defendants, that, from the situation of the ship and cargo on her arrival at *Bermuda*, it was not possible to prosecute the voyage, and that the sale of the cargo therefore became necessary, but Lord *Ellenborough* delivered his opinion, that in any event the sale was unauthorized, and that, therefore, if it was shewn that the voyage could not be proceeded in, the plaintiff was entitled to a verdict against the defendant *Patterson*, upon the count in trover; and upon the reference being agreed upon, it was understood, that the arbitrator was in the first instance to inquire, whether the voyage could have been prosecuted, and according to the result of that inquiry the verdict was to be entered against all the defendants, or against the defendant *Patterson* only. The arbitrator, after hearing the evidence, was of opinion that the plaintiff was entitled to

to his verdict against all the defendants. But with respect to the amount of the damages questions of law arose, on which the parties wished for the opinion of the Court, and the arbitrator stated the facts so as to raise those points. The plaintiff contended, first, that inasmuch as the master of the ship was in this instance a part-owner, the case was not within the statute of the 53 G. 3. c. 159. Upon this point, the arbitrator was of opinion against the plaintiff, but stated, that if his opinion was incorrect, the damages ought to have been increased to the sum of 6000*l*. The next question that arose was, admitting the case to be within the statute, at what period the value of the ship was to be taken: whether at the time of the cargo being put on board, or at the time the cause of action arose; viz. when the voyage was abandoned. If the latter period was taken, then from the depreciation of the value of shipping, on account of the peace with *America* having taken place, and from the damage which the ship had received in the voyage, (which damage however was covered by an insurance,) the value was considerably reduced. The arbitrator thought that the *value at the time when the cargo was put on board, and which was the sum for which the persons shipping goods were entitled to consider the owners as responsible*, was the proper value, and awarded accordingly, but stated, that if his opinion in this respect were incorrect, the defendants were entitled to a deduction of 750*l*., for the depreciation in the value of shipping in general, and to a further deduction of 250*l*. for the damage sustained by the ship on the voyage, if the Court should think that that ought also to be deducted from the value.

The only remaining question was, as to the sum of

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456*l.* 10*s.*, the two months' freight, before stated to have been paid on the ship's sailing from *Gravesend*. This, the defendants contended, could not be considered as freight due or to grow due, and therefore ought not to be included in the amount of the damages; and if they were right on this point, the arbitrator stated, that they were entitled to the deduction of that sum, as it was included in the amount for which the verdict was by his award to be entered.

Richardson, for the plaintiff. At common law, the defendants would be responsible to the full extent of the actual loss sustained. By the 53 G. 3. c. 159. s. 1., the owners are not to be charged with any loss arising from any act, neglect, matter or thing done, omitted or occasioned, without their fault or privity, further than the value of the ship, and the freight due or to grow due, for and during the voyage. The preamble states, that it was expedient to amend the 7 G. 2. c. 15., and 26 G. 3. c. 86., both which acts were passed to settle how far owners should be answerable for the acts of masters and mariners. The 53 G. 3. was passed in furtherance of the same object, that is, to limit the responsibility of ship-owners for the acts of their servants. In this case the master is not the servant but in fact one of the owners; he is a partner in the concern, and his co-partners are therefore liable for the consequence of his acts to third persons: had he been the sole owner of the ship, he clearly would not be within the protection of the statute. As far as respects third persons, the ownership is entire, and the loss having been occasioned by the act and with the privity of one, must be taken to have been by the act and

and with the privity of all; and in that case it is not within the first section of the act. It is certainly competent to the owners to appoint a part-owner captain; by so doing, however, they vary the rights of the shipper against the underwriter. In the case of a loss occasioned by an act which would amount to barratry, in a captain not being an owner, the shipper could not recover against the underwriter, because a part-owner cannot be guilty of barratry. As, therefore, by selecting a part-owner for master, they thereby deprive the shipper of a remedy against third persons, it is not unreasonable, that they should give him a further remedy against themselves. Supposing, however, that the case is within the statute, and that the owners are answerable only for the value of the ship and freight, that value must be taken at the time of the shipment, and not of the loss. The object of the legislature, was to encourage the vesting of capital in shipping, and for that purpose they restricted the responsibility of ship-owners to the amount of their capital embarked in the ship. The shipper can only look to the state of the vessel at the time of shipment: it is to that value only which he trusts as the fund to indemnify him against loss. The policy of the act only requires, that the owners' responsibility should not extend beyond their capital vested in the concern; and it is consistent with the language of the first section, that the value should be estimated at the time of shipment; for the words "at the time of the happening of such loss or damage," refer only to the freight due or to grow due, and not to the former part of the sentence. As to the third point, it is clear, that the words "freight due or to grow due," as used

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in this act, must mean the freight earned during the voyage, for that is the value of the freight to the owners; and the argument on the other side turns on a mere verbal criticism.

Scarlett, contra. The owners of a ship cannot, like partners in general, select with whom they will be in partnership; and the master is a person chosen by the several owners; each having an influence in proportion to the quantity of his interest; a smaller proprietor, therefore, may be outvoted by the larger, who may even appoint himself. The appointment of the master not being in the selection of all the owners, it seems to be consistent with policy and justice, that the responsibility of the part-owners of a ship should bear a proportion, and even be restricted to the amount of their several interests in the vessel; and such appears long to have been the general law of *Europe*. *Abbott on Shipping.* (a) The *French* ordinance there referred to directs, that the owners shall be liable for the acts of the master, but shall be discharged, *upon relinquishing the ship and the freight*. The object of the legislature, in passing 53 G. 3. c. 159., was to assimilate the law of *England* to that which had long been the law of other commercial countries: and the great principle was to limit the responsibility of the several part owners to the amount of their respective capitals embarked in the ship. With reference to that principle, as far as the several owners are concerned, it is wholly immaterial, whether the owner or a stranger be captain; they are still to be answerable only to the amount of

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their interest in the ship and freight; and this appears to be the true construction of this clause, from the fourth section of the act, which expressly provides, in the case of a master or mariner being part-owner, that his responsibility as master or mariner shall, notwithstanding that circumstance, continue. This case, therefore, falls as well within the principle as within the express words of the act of parliament, and the defendants are not liable beyond the value of the ship and freight. Supposing that to be so, then that value must be the value at the time of the loss, and not at the time of the shipment; for the words "at the time of the happening of such loss or damage," refer to the whole antecedent words: if they did not, and the construction contended for on the other side be correct, the value of the ship and freight must be calculated from different periods; that of the ship at the time of the shipment, and that of the freight at the time of the loss. The argument that the freighters look to the apparent value of the ship at the time of the shipment, as the fund to indemnify them, wholly fails, upon considering the entire clause; for the statute contemplates not only the case of damage to goods shipped on board, but also damage done to any other ship; that argument, therefore, clearly does not apply to the case contemplated in the latter part of the clause, yet the limitation of responsibility is exactly the same in both cases. In the case, too, of a change of owners, during the voyage, and a subsequent loss accruing, to what extent would the new owners be liable? if they purchased at a price lower than the value of ship and freight, what pretence would there be for saying that they were liable for the original value, when she sailed? or if, on the

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the other hand, they had purchased her during the voyage, at a price higher than the original value, would they be liable only for the original, and not the then actual value? The meaning of the statute clearly was to limit the responsibility to that amount, which constituted the existing value to the then owners, not to that which was the value at a former period to others. The effect, however, of the argument on the other side would be, to make them responsible to the amount, not of the present, but of the former value of the ship. The value therefore must be taken at the time of the loss, and not of the shipment. As far as the freight is concerned, the owners are liable only for the amount of freight due or to grow due, not for freight *earned*: here the freight paid by anticipation did not come within that description, and therefore it is not to be taken into the account.

BAYLEY J. This was a special action on the case brought by the plaintiff against the defendants as joint-owners of the ship *Hope*, on account of the loss of certain goods therein laden belonging to the plaintiff; the nature of the loss was, the improper sale (by *Patterson* the captain and part owner) of those goods in the course of the voyage: the cause was referred, and the arbitrator has by his award submitted for the consideration of the Court three questions which arise upon the 53 G.3. c.159. The first question is, whether, inasmuch as there was fault or negligence on the part of *one* of the three owners, that takes away the protection given by the statute to the other part-owners? and supposing his fault does not take away from the others (who are sued jointly with him) the protection

of this statute, the second question is, whether the value of the ship in this act of parliament is the value at the time of the loss, or at the time when the ship commenced her voyage? and the third question is, whether, under the words "freight due or to grow due," that part of the freight which was paid by anticipation is to be taken into the account? Upon the first point the arbitrator was of opinion that upon the true construction of this act, the defendants being sued jointly, and no fault being imputable to more than one of them, in the form in which this action was brought the defendants were entitled to the benefit of the act, and were not responsible beyond the value of the ship and freight. And in this respect it seems to me the arbitrator came to the proper conclusion. The object of this act of parliament is to limit the responsibility of ship-owners, and the words of the first section are, "that no person or persons who is, are, or shall be owner or owners, or part-owner or owners of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter or thing done, omitted or occasioned, without the fault or privity of such owner or owners, which may happen to any goods, wares, merchandize, or other things, laden or put on board the same ship or vessel, or which may happen to any other ship or vessel, or to any goods, wares, merchandize, or other things being in or on board of any other ship or vessel further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage." The act therefore
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contemplated two descriptions of losses, the one a loss or damage to the cargo laden on board the ship, the other a loss or damage to an unconnected ship or her cargo. This is not the first act of parliament which limited the responsibility of ship-owners: for the 7 G. 2. c. 15. was an act passed for the same purpose, but the words "part-owner or owners" were certainly not used in that statute, and I rather think they are for the first time introduced into this act. Without however considering whether those words were previously introduced into any intermediate statute or not, it is clear that the use of them in this act shews an anxiety on the part of the legislature to explain the words "owner or owners," used in the 7 G. 2. c. 15., and to give a protection to *part-owners* which might not have been given under the general words *owner or owners*. Indeed it seems as if those terms were introduced as a legislative exposition of the words "owner or owners" as used in the former statute. It is admitted that the words in the first section are sufficiently large to give the protection of the statute to these defendants, but it is said that the object of the statute was to protect the owners against the acts of their servants, and not against their own acts; that this is a loss occasioned by the act of one of several partners, and that therefore the whole are liable. But part-owners though jointly liable to the persons with whom they contract on account of the ship, yet in many respects stand in a very different situation from that of partners; and for this amongst other reasons, that in the case of a partnership every man knows who his partner is, but when one part-owner sells his share, the remaining part-owners not being privy to the instrument by which the new part-owners are created, may be entirely ig-

norant of the fact who the person is who has become a part-owner with them. And it is to be observed, also, that the words of the statute are "that they shall not be liable for any act, &c. without the fault or privity of such owner or owners," without saying, "or any of them." So that it seems that the true construction of the clause is this, that if you sue a sole owner, and the fault or privity were in him, he will be excluded from the protection of the statute: but if you sue several owners, then the words applicable to that case are "without the fault or privity of such owners," the fair and true construction of which is, that there must be the fault or privity of each. The fourth section of the act seems to shew that that is the right construction; for that section provides that "nothing shall lessen or take away any responsibility to which any master or mariner of any ship may now, by law be liable, notwithstanding such master or mariner may be an owner or part-owner, &c." It seems to me that the meaning of that clause is, that if the master be a part-owner, his responsibility, if you sue him in his character of master and not as one of several part-owners, will not be affected by the first section of the act, but that if you sue him as one of the part-owners with the other part-owners, the circumstance of the loss being occasioned by his fault and with his privity will not take away from the other part-owners the protection which the first section of the statute intended to give to them.

The second question is, at what period of time you are to estimate the value of the ship: the words of the act as to that point are, "further than the value of his or their ship or vessel, or the freight due or to grow due during the voyage which may be in prosecution, or

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contracted for at the time of such loss or damage." It has been argued, that the words "at the time of such loss or damage," not only refer to the freight due or to grow due, but also to the words "their ship or vessel." It seems to me, however, that they do not apply to either, but are connected with the words "the voyage." For these words are substituted for others, which are found in the 7 G. 2. c. 15. s. 1., which are, "the full amount of the freight due or to grow due for and during the voyage, *wherein such embexxlement shall be made, permitted, or done.*" Then substituting for these latter words in the 7 G. 2. the words, "at the time of the said loss," in the act in question, it clearly appears, that these latter words apply to "the voyage," and not to any other part of the sentence. The question, therefore, must be considered as if those words were not in the act. In speaking of value generally, we must be understood to speak of existing value, and in this instance the legislature is speaking of a thing existing at a particular period of time, for they use the terms freight due, that is due at the time of loss; for the words "to grow due," apply to the freight that may become due upon that voyage, after the loss. With respect therefore to freight, the legislature contemplated two periods of time, viz. freight due at the time of the loss, and freight due at the conclusion of the voyage; and if they had intended that the value of the ship was to be taken at two periods also, or at a period different from that of the loss, they would have used words to express their intention in that respect. It has been argued, that the owners of the cargo trusted the owners of the ship to the amount of the value of the ship before she sailed, and that there-

therefore they ought to continue liable to that extent; but it must be recollected, that their responsibility is limited also in like manner in the case of damage done to any other ship by collision, &c.; and it being obvious that this argument could only apply to the one class of cases and not to the other, both being included in the same clause, it follows, that the argument is not entitled to any weight. Upon the whole, therefore, it seems to me, that the words "the value of his or their ship or vessel," must, unless there are some other words to control them, mean the existing value at the time when the loss takes place: the mode of ascertaining that value is a matter of evidence, and may possibly be attended with some degree of difficulty. If the ship ultimately arrive, by ascertaining her then value, you may easily find the value at the time of the loss; in other cases, when the exact time of the happening of the injury is uncertain, the plaintiff may launch a *prima facie* case, by shewing the value at the time of sailing, leaving it to the opposite party to shew what deterioration had taken place. That, however, is mere matter of evidence, and no positive rule can be laid down upon the subject; and possibly (I only say possibly) the legislature, from motives of policy, might think, that persons who had embarked their property in shipping should, on giving up all they had ventured in a particular voyage, be relieved from any further responsibility.

The third and last question is, what is the true construction to be put upon the words "freight due or to grow due?" and it seems to me that those words mean all the freight for that voyage, whether paid in advance or not. If the whole freight had been paid in advance, according to the argument, the defendants would

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would be liable to the value only of the ship, and not of the freight. It is clear, on the other hand, that it would come within the very words of the act, if the whole freight were due at the time of the loss; and it seems to me, that it ought not to make any difference with respect to the owner's responsibility, whether the freight be in his own pocket, or in that of the person who would have to pay it. I therefore think that the words "freight due or to grow due," were meant to comprehend all the freight for the voyage, and that it makes no difference whether that freight was paid in advance or not.

ABBOTT J. (a) I entirely agree in the opinion delivered by my brother *Bayley*, on the different points of this case, and in the comments he has made on the language of this act of parliament: those comments are so full and so clear that I feel it unnecessary to add any thing upon the subject.

HOLROYD J. concurred.

The Court ordered the sums of 750*l.* and 250*l.* to be deducted from the damages, and the verdict therefore stood for the sum of 2196*l.* 10*s.*

(a) The Lord Chief Justice was not sworn into his office until the fourth day of *November*: the sittings at *Serjeants' Inn* finished on the third.

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GIBBON *against* MENDEZ. (a)Friday,
Nov. 6th.

COVENANT on a charter-party of the 26th September, 1817, between the plaintiff, part-owner of the ship *Indian*, (whereof *John Davison* was commander,) of the one part, and the defendant, described as acting on behalf of the united provinces of *Venezuela*, freighter of the said ship, of the other part; by which it was covenanted, that the ship should receive a cargo in *London*, and proceed to such places as the freighter should direct, and there unload and reload, and being reladen, should return to *London*; that the ship should continue in the service six calendar months at least, to commence from the 4th of October, and for such further time as would be necessary to complete the voyage. The covenant upon which the question in this case depended, was in the following words: "And further, that the freighter should well and truly pay unto the owner, freight for the use of the ship, at and after the rate of twenty-three shillings sterling per ton per calendar month, for and during the term of six calendar months at the least, to reckon and be accounted from the 4th October, 1817, and so in proportion for any time less than a whole calendar month, and at and after the like rate for all such further time (if any) as the ship might be kept and

By charter-party the freighter covenanted to pay to the owner freight at and after the rate of so much per ton per month, for the term of six months at least, and so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship in manner following, viz. so much as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival

there, and the remainder of the freight at specific periods: Held that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight, and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss.

(a) This case was argued at *Serjeants' Inn*.

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detained in the service of the freighter, and until her final discharge in the port of *London*, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship for the time being, in cash, in manner following; that is to say, so much as might be earned at the time of the arrival of the ship *at her first destined port abroad*, to be paid within ten days next after her arrival at such *port*, and previous to the delivery of her cargo; and at the expiration of every calendar month after that period the freight then due was to be paid up from time to time, during the continuance of the ship in the service of the freighter; and the residue or balance of freight, that might become due upon the final discharge of the ship, under and by virtue of that charter-party, to be paid on the day the ship should be so finally discharged from her intended service. And that in case default should be made of or in the payment of any part of the freight, it should be lawful to the commander of the ship to withhold and retain, and to sell and dispose of so much of the cargo on board, as might be sufficient to cover the amount of the freight, and out of the proceeds to pay the freight then due." The charter-party then contained a proviso, that the freighter "should, at any time during the continuance of the voyage, have the option of purchasing the ship for 7350*l.*, upon giving notice of his intention to the owner, and also upon paying to the owner or to the commander of the ship the freight which might be earned up to the time of such purchase; and upon such notice being given, and payment of the consideration money and freight, the owner was to execute a bill of sale

sale to the freighter." The declaration then stated, that the ship being tight, staunch, &c., received on board a cargo, in *London*, and afterwards set sail, and proceeded towards the island of *St. Bartholomew*, by the directions of the freighter; and that afterwards, and before her arrival there, or at any other port or place, the ship was lost by the perils of the sea; and that she was last seen or heard of on the 9th day of *December*; and that the freight for the hire of the ship, from 4th *October*, up to the day of her loss, amounted to 1400*l*. The breach alleged was the non-payment of the freight. Plea, after craving oyer of the charter-party, that the ship never arrived at the island of *St. Bartholomew*, being her first destined port, according to the form and effect of the charter-party of affreightment. To this plea there was a demurrer and joinder.

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Campbell, in support of the demurrer. Although the plea be bad, the question must turn ultimately upon the sufficiency of the declaration, and that again will depend upon the construction of the covenants in the charter-party for the payment of freight; viz. whether the true meaning be that freight was to be payable at all events, or only in the event of the arrival of the ship at her first destined port. Now, although in general freight is not payable till the performance of the voyage, yet it is competent to parties, by express stipulation, to contract otherwise; and here they have made the freight payable *de die in diem*, without reference to the successful termination of the voyage. There are two distinct covenants, one is, "to pay freight to

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the owner, at so much per ton per month, for six months at least, and so in proportion for a less time than a month, until her discharge in *London*, or being last seen or heard of." Now, if the charter-party had stopped there, the plaintiff would be entitled to recover freight up to the time of the loss of the ship; but there then comes a distinct covenant, as to a particular mode in which the freight may be paid; this latter covenant, however, by no means controuls or dispenses with the former, which was for the payment of freight generally. It stipulates, "that the freight is to be paid to the commander of the ship for the time being, so much as should be earned at the first destined port abroad, within ten days after her arrival there, and previous to the delivery of the cargo, and at the expiration of every calendar month, during the continuance of the voyage, and the remainder on the final discharge of the ship." This is one mode in which the freighter is bound to pay the freight, if required; but it is by no means the only one; for by his former covenant, he was bound to pay freight to the owner, at so much per month: and that it is not the only mode in which the freight is to be paid, appears most clearly from the subsequent covenant, stipulating, that the freighter might, *at any time* during the voyage, purchase the ship for a given sum, upon giving notice to the owner, and paying *the freight then due*. The freight then due must be paid to the owner, who is resident here, and not to the commander, who is absent on the voyage, and events might occur which might render the latter mode of payment impossible; for example, if the ship were to founder in her homeward voyage, and the

master

master were lost, the freight due at the time of the loss could not be paid in the mode stipulated; yet in such a case, it could not be argued that no freight would be payable. Inasmuch, therefore, as the payment of freight due during the voyage to the owner is contemplated by the charter-party, and as by events the particular mode prescribed by the latter covenant may become impossible, it follows, that the mode of payment prescribed in that covenant is not the only mode intended by the parties. In *Havelock v. Geddes* (a) Lord *Ellenborough* is reported to have said, that a covenant prescribing the mode of payment is not to be considered as creating a contingency on which the payment of freight was to depend. In *Mackrell v. Simond* (b) the freight was to be paid on the arrival of the ship in *London*: the vessel performed her outward voyage, and was lost in her homeward; the event, therefore, upon which the payment of freight, according to the prescribed mode, was made to depend, never happened; yet, as the charter-party expressly mentioned an outward and a homeward voyage, it was holden, that the owners were entitled to recover freight for three months, which was the period of the outward voyage; that case, therefore, is a decisive authority in favour of the plaintiff's right to recover.

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Richardson, contra. The true meaning of this covenant is, that freight is to become payable only in the

(a) 10 *East*, 567.(b) *Abbott*, 345.

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event of the ship's arrival at her first destined port. The covenant is not to be split; the whole must be taken together; the freight is to be paid according to the tonnage of the ship and duration of the service: so far the covenant fixes the rate of the freight, and the time during which it is to continue to run; but the period when it is to become due is only fixed by the subsequent part of the covenant, and by that no freight is to become payable until the arrival of the ship at her destined port. In *Byrne v. Pattinson* (a) the freighter covenanted to pay freight at so much per month, to be paid on the arrival of the ship at *Liverpool*: the ship being lost on her homeward voyage, it was holden, that no freight was payable; and in *Smith v. Wilson* (b), the covenant was to pay freight at so much per month, fixing the period when it was to commence, and how long it was to endure, and then there was a stipulation, that such freight should be paid on her arrival and discharge at a port in *Great Britain*; and it was holden, that such arrival at a port in *Great Britain* was a condition precedent to the right of recovering any freight whatever. As to the case put, of the ship's being lost in her homeward voyage, and the consequent loss of the captain, payment to his personal representative in that event would be sufficient to satisfy the terms of the covenant.

BAYLEY J. The question in this case is, whether, in the event stated in the pleadings, the plaintiff is entitled to recover any part of the freight; and that question

(a) *Abbott*, 347.

(b) 8 *East*, 437.

turns upon this : whether by the terms of the charter-party freight is payable pro rata if the ship never reaches her outward port. We must not make a new contract for the parties, but must look at the terms in which the contract itself is expressed. The words of the covenant are “ that the freighter should pay to the owner freight at so much per ton per calendar month for the space of six calendar months at least, and so in proportion for any time less than a calendar month, and at the like rate for all such further time as the ship might be kept and detained in the service of the freighter, and until her final discharge in the port of *London*, or up to the day of her being lost, captured, or last seen or heard of.” So far the covenant provides for the rate at which freight is to be paid, the time when the earning of the freight is to commence, and the period when it is to end ; it then goes on to fix the time when the freight is to become payable. The words are “ such freight to be paid to the commander of the said ship for the time being, in manner following ; viz. so much and such part thereof as might be earned upon the arrival of the said ship at her first destined port, to be paid within ten days next after her arrival at such port, and previous to the delivery of her cargo ;” and it then provides for the payment of the freight that should subsequently become due ; but no provision whatever is made for the payment of any freight until the arrival of the ship at her first destined port. It has been argued that these provisions constituted two distinct covenants, one to pay freight to the owner generally, and another to pay to the commander in a particular way. In my opinion they constitute one entire

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continued covenant, qualified as to the mode of payment; and the first qualification is the ship's arrival at her first destined port. The parties do not seem to have contemplated the possibility of loss before the arrival of the ship at that place. When, therefore, we find that the contract itself contains a qualification as to the time of payment, and that that time has not arrived, and never can arrive, we ought to see most clearly, from other parts of the instrument, that the construction now contended for is consistent with the intention of the parties: but no such intention is to be collected from this instrument. On the contrary, as the outward voyage would be of no benefit to the freighter, unless the ship reached her port of delivery, he may very reasonably have intended that the risk of that voyage should be thrown upon the ship-owner. At all events, where the freighter derives no beneficial use from the ship there ought to be a clear express stipulation, in order to charge him with the payment of freight, and this charter-party contains no such stipulation. For the provision which makes the freight payable ten days after the arrival of the ship at the outward port shews rather that the freighter contemplated a benefit from the performance of the outward voyage before he charged himself with the payment of freight. The parties might have made a different contract; but, upon considering the terms of this charter-party, I think that in the contemplation of the parties no freight was payable till the arrival of the ship on her outward voyage. In *Mackrell v. Simond*, the Court thought that though the charter-party defectively stated the intention of the parties, still that upon the whole an intention

intention to pay freight for the outward voyage was to be collected. There, two distinct voyages, the outward and the homeward, were expressly described, and it was holden that freight pro rata was payable for the voyage out. But, to apply that case to the present, it should appear that this charter-party defectively states the intention of the party. I cannot see that it was intended to throw upon this defendant the risk of the loss of the outward voyage; and, upon the whole, I am of opinion that the parties having fixed the period of time at which the freight was to become payable, and that period not having arrived, no freight is due; and therefore that the plaintiff is not entitled to recover.

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ABBOTT J. I think that the provisions respecting the payment of freight constitute one entire covenant, and that the payment of any freight is made to depend on the arrival of the ship at her outward port. It was competent to the parties to have made the freight payable at all events. By the terms of this charter-party they have only made it payable on a contingency which has never happened, and consequently the plaintiff is not entitled to recover.

HOLROYD J. I am also of opinion that the plaintiff is not entitled to recover. By the terms of the covenant the freight is not to become *due* monthly, but to be at and after the rate of so much per month, and the first part of the covenant, by which the freight is to be paid to the owner, is not distinct from the second part, by which the time when the freight is to become due is fixed, and that being so, the event has not happened

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upon which the freight was to become payable; and, therefore, no freight is due. The case of *Smith v. Wilson* seems to me expressly in point.

Judgment for Defendant.

Friday,
Nov. 6th.

MASON and Others *against* BARFF and Another. (a)

The vendor of goods had been in the habit of drawing bills in payment upon the vendee, and discounting the same with bankers, by whom the bills were transmitted by post for acceptance: the vendee cautioned the bankers to inquire, when they discounted any such bills, whether the goods for which such bills were respectively drawn had been delivered, and the

carrier's receipt sent, and assured them that in that case they would be accepted. The bankers afterwards discounted a bill, and transmitted the same for acceptance to the vendee, who detained it in his possession for ten days, and then informed the bankers that he could not accept the bill, as the invoice of the goods had not been delivered; and after a further interval of sixteen days, the bankers having made no objection to his detaining the bill, returned the same; the vendor having then stopped payment, without delivering the goods or sending the carrier's receipt: Held that the drawee of the bill was not liable as acceptor.

Quære, Whether in any case the mere detention of a bill, for an unreasonable time, by the drawee, with whom it is left for acceptance, in point of law amounts to an acceptance.

ACTION by the plaintiffs *Christopher Mason, John Bailey, John Langhorn, Thomas Hopper, Robert Botcherby, Richard Smith, William Farrer, and Thomas Clark*, against *William Barff and Thomas Barff*, as the acceptors of two bills of exchange for 200*l.* each, drawn by *Richard Brankston*, one dated 23d February, the other 9th March, 1815, payable three months after date to his own order, and indorsed by him. The defendants pleaded the general issue. The cause came on to be tried before Lord *Ellenborough* C. J. at the *London* sittings after *Michaelmas* term 1816, when a verdict was taken for the amount of the bills, subject to the opinion of the Court upon the following case.

(a) This case was argued at *Serjeants' Inn*.

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The plaintiffs *Mason, Bailey, and Langhorn* were the solvent partners of *Arthur Mowbray, George Lewis Hollingsworth, and John Wetherell*, and the plaintiffs *Hopper, Betcherby, Smith, Farrer, and Clark*, were assignees of the said *Mowbray, Hollingsworth, and Wetherell*, who since the drawing of the bills became bankrupts. The bankrupts, together with *Mason, Bailey, and Langhorn*, before the drawing of the bills, carried on the business of bankers at *Berwick* under the firm of *Mowbray and Company*. They also kept a banking shop at *Wooler*, a place about twenty miles from *Berwick*, at which place a *Mr. George Bolton* was their agent and manager. *Richard Brankston*, a fellmonger residing at *Wooler*, in *Northumberland*, had, before the drawing of the bills in question, sold the defendants, who carried on an extensive wool trade at *Wakefield*, in *Yorkshire*, considerable quantities of wool at various periods, for the payments of which *Brankston* was in the habit of drawing bills upon defendants, as he made his consignments, which bills were discounted at the bank of *Mowbray and Co.* at *Wooler* by *Bolton* their agent: the bills so discounted were forthwith sent by *Bolton* to *Mowbray and Co.*, and transmitted by them to the defendants at *Wakefield* for acceptance. On the 30th *August*, 1815, the following letter was sent by Messrs. *Barff and Son* to *Mowbray and Co.*: “ We return you *Richard Brankston* on us 100*l.* at three months, accepted in *London*: in discounting *Mr. Brankston* any bills he may in future draw upon us, it might be well to inquire of him if he has delivered the wool he values for, and sent the carrier’s receipt to us ; in this case the draft is sure of being accepted without delay,

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lay, as we always wish him to command the money on delivery of the article at Wooler."

Brankston applied to *Bolton* on the 23d *February*, 1815, to have the first-mentioned bill for 200*l.* discounted, and told *Bolton* that the value in wool had been sent, and the carrier's receipt had been also remitted to *Barff* and Son, the defendants, which would ensure the regular acceptance of the bill; adding, also, that he should have another bill to draw in fourteen days, having wool to that amount to send to *Barff* and Son. Upon this application *Bolton* discounted the bill for 200*l.*, and as usual immediately sent it to *Mowbray* and Co. at *Berwick*, to be remitted by them to defendants for acceptance, which was accordingly done, on the 25th *February*, 1815, accompanied by a letter, of which the following is a copy: "We enclose *Richard Brankston's* draft 200*l.*, which we shall be obliged to you to accept and return to us."

This letter, with the bill enclosed, was received by the Defendants, according to the course of the post, on the 27th *February*. On the 9th *March* following, *Brankston* again applied to *Bolton* as he had before intimated, to discount the other bill for 200*l.*, dated the 9th *March*, 1815, upon *Barff* and Son; and *Bolton* not having had notice that the first bill had not been accepted, concluded it had been duly accepted; and being assured by *Brankston* that wool had been sent off to *Barff* and Son to the amount of both bills, and the carrier's receipt also transmitted to them, which would insure the acceptance of the second bill of 200*l.*, discounted the same, and immediately transmitted it to *Mowbray* and Co., who forwarded it on the 11th of *March*,

March, enclosed in the following letter to *Barff* and Son for acceptance: "We enclose *Richard Brankston's* draft 200*l.*, which we shall be obliged to you to accept and return to us." *Barff* and Son took no notice of *Mowbray* and Co.'s letter of 25th *February*, 1815, inclosing the bill dated *February* 23d, 1815, until the 8th *March*, on which day they sent the following letter to *Mowbray* and Co., which was received by the latter according to the course of the post, on the 11th of *March*: "Ever since the receipt of your letter enclosing *Richard Brankston's* draft on us, we have been in expectation of receiving an invoice from him, to enable us to give it our acceptance. He wrote to request that we would not return the draft to you, but hold it till we received his invoice of the wool, for which he had drawn, which he promised should come in a post or two after the bill: the present is therefore to acquaint you, that we are not yet enabled to give the draft our acceptance, and that if you wish to have it returned, if you will write to us to that effect, we will do so, but we look for his invoice every post."

Nothing further was heard by *Mowbray* and Co. from the defendants upon the subject of the two bills, until they received the following letter, dated *Wakefield March* 25th, 1815, and enclosing the two bills in question: "This morning's post brought us a letter from Mr. *Richard Brankston*, Wooler, desiring us to send payment for a sheet of wool, and a small balance we owed him to you. We have therefore enclosed you a bill value 30*l.*, which please place to the credit of his account with you, and advise receipt. As we have

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not thought it of any use holding the two bills drawn upon us longer, we therefore beg to make use of the present opportunity of returning them to you." This letter was received by *Mowbray and Co.* on the 27th *March*, 1815, in reply to which they on the same day sent the defendants the following letter: "We have your favour of the 25th, inclosing two bills of *Richard Brankston*, 200*l.* each; and as you have held them (it would seem at his request) without giving us due notice of your intention to refuse the acceptance of them, we consider you responsible to us for the amount; and in regard to the 30*l.* bill, we will either retain it and pass it to the credit of those bills, or return it as you may direct." *Mowbray and Co.* having received no answer from the defendants, on the 4th *April*, 1815, wrote the following letter: "We wrote you on the 27th ult., to which as we have not received any answer, we return you the 30*l.* bill remitted to us, and shall expect the regular payment of *Brankston's* drafts on you, 200*l.* each, when they fall due."

Brankston failed on the 15th *March*, 1815. Neither *Bolton* nor *Mowbray and Co.* knew any thing of the insolvent situation of *Brankston* at the time he discounted the 200*l.* bills.

The question for the opinion of the Court was, whether the detention of the two several 200*l.* bills by *Barrff and Son*, under the circumstances, and for the length of time above stated, amounted to an acceptance of them.

Reader, for the plaintiffs, after admitting that the plaintiff's claim as to the second bill was not to be supported,

ported, contended, that the detention of the first bill by the drawee, from the 27th of *February* until the 8th of *March*, in point of law, amounted to an acceptance; for an acceptance may be made by the party's writing his name on the bill, or by a promise to pay an existing bill, or by any act from which such a promise is clearly to be inferred. Where a bill is left with the drawee for acceptance, unless he return it within a reasonable time, he must be presumed to have done that for which the bill was originally left, viz. accepted it. The usual course of business is, to leave the bill on one day and to call for it on the next, when it is returned accepted, or refused; and where bills are transmitted by the post, they ought in due course to be returned by the following post. Now here the bill was not so returned, nor was there any refusal to accept, and, therefore, the drawee must be presumed to have done that for which the bill was sent, viz. to have accepted it. In *Harvey v. Martin* (a), Lord *Ellenborough* is reported to have said, that the retention of a bill by the drawee, with whom it was left for the purpose of being accepted, is as much an acceptance as if the drawee had written his name upon the bill; and *Trimmer v. Oddy* (b) is an authority in support of the same principle; but whether or not the mere retention be in every case an acceptance, still, under the special circumstances here stated, this was an acceptance. For it appears to have been the course of dealing between these parties to return the bills by the next post; and in this particular instance only, the defendants kept the bill, in concert with the

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(a) 1 *Campb.* 426.(b) *Guildhall sittings*, 1800, *Chitty, Bills of Exch.* 160.

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drawer. If they had intended to decline acceptance, their refusal ought to have been immediately notified to *Mowbray* and Co.; and in consequence of their silence, *Mowbray* and Co. were induced to discount the second bill; inasmuch, therefore, as they retained the bill, contrary to the usual course of business, their retention must be considered as an acceptance.

Littledale, contrà. This does not amount to a constructive acceptance of the bill, either upon any general principle of law, or under the special circumstances of this case. An acceptance is a contract to pay the bill when due: the mere detention of the bill is at most no more than a breach of duty, in neglecting to return it within a reasonable time; a duty resulting only from the usage between the parties; but such detention is no evidence of a promise to pay the bill when due. Indeed if this were an acceptance, how could subsequent holders know whether the bill were accepted or not, as the acceptance would not appear on the face of the bill. So that great inconvenience would arise: and in deciding a case of this kind, the Court will feel disposed to lay down a rule that will be most convenient for the purposes of commerce and the negotiability of bills. It has never been decided, that the mere detention of a bill by the drawee is an acceptance. The cases cited all turn upon special circumstances; and *Jeune v. Ward* (a) is an authority the other way. When the circumstances of this case come to be considered, it is clear, that the defendants only meant to accept this bill, upon a condition which has not been complied with; and that *Mowbray* and Co. themselves never considered the bill

(a) 1 *Barn. & Ald.* 653.

as accepted. In the letter of the 30th of *August*, *Mowbray* and Co. are apprized by the defendants of their course of dealing with *Brankston*, and are desired to make the inquiry there pointed out, and they are informed, that if *Brankston* sends the wool and the carrier's receipt, the bills will be accepted. But here the wool was not delivered, nor was the carrier's receipt sent, and *Mowbray* and Co., therefore, ought to have known that the bill would not be accepted, and they acted as if they thought so, for they made no complaint, nor did they affect to treat it as an accepted bill, until after *Brankston's* insolvency. This, therefore, is not an acceptance, inasmuch as the promise to accept was only upon a condition which has never been complied with, and as the parties themselves have never considered it as an accepted bill.

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BAYLEY J. It seems to me that the plaintiffs are not entitled to recover, and that this bill is not to be considered as accepted. Constructive acceptances ought to be watched with the utmost care, for when a party puts his name on a bill, he knows what he does, and that he thereby enters into a contract; but it is laying down a very loose and dangerous rule, when any degree of latitude is given to these cases of constructive acceptances. A constructive acceptance is where the drawee, without actually putting his name on the bill (which is the usual mode of accepting), assents to become liable as acceptor. In any such case, the consent of the party sought to be charged as acceptor, should be clearly to be inferred from his conduct. Supposing that the detention of the bill would in some cases in point of law amount to an acceptance, does it clearly appear in this case that by such detention the

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defendant meant to charge himself in that character? *Brankston* had been in the habit of drawing upon these defendants, and *Mowbray* and Co. had been in the habit of transmitting the bills so drawn by *Brankston*, to the defendants, for their acceptance; and the defendants, in a former letter enclosing an accepted bill which had been sent to them by *Mowbray* and Co., had used these words: "In discounting Mr. *Brankston* any bills he may in future draw upon us it may be well to inquire of him, if he has delivered the wool he values for, and sent the carrier's receipt to us; in this case the draft is sure of being accepted without delay." That letter clearly intimated to *Mowbray* and Co. that the defendants did not intend to accept *Brankston's* bills at all events, but only when they were sure that the wool was delivered to the carrier, and in a train to reach them. In the ordinary course of business the holder of a bill leaves it for acceptance and calls for it again; but here the bill was transmitted to the drawees by letter. And *Mowbray* and Co. had no right to throw on the defendants the obligation of answering every letter they might think fit to write; because if they chose (instead of employing an agent) to deal with the drawees by letter, they constituted them their agents. Then the double character of drawee and agent are united in the same persons; and express notice is given by them standing in that double character, "that they will accept, provided the goods are delivered, and the carrier's receipt sent." Under these circumstances on the 25th of *February*, *Mowbray* and Co. enclosed a 200*l.* bill of *Brankston's* which they desire the defendants to accept and return to them. Now all that they had any right to expect was, that
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the defendants would accept such bill without delay, (that is by return of post, which would be on the 2d *March*) *provided the goods had been delivered, and the carrier's receipt sent.* But the 2d of *March* having come, and the bill not being then returned accepted, they ought to have presumed that there was some reason for it; such as the non-arrival of the carrier's receipt, for the arrival of which the defendants were waiting: after an interval of nine days, however, the plaintiffs send for acceptance another bill in a letter, which does not contain any remonstrance on account of the former bill not having been returned; that letter is also received, and on the 11th *March*, the plaintiffs received from the defendants a letter, in which they state in distinct terms, that they had not received the carrier's receipt, and that they could not therefore accept the bill. It is true that they had been keeping the bill at the instance of *Brankston*, but it was so kept with a view also to the interest of *Mowbray* and Co., for the defendants expected the invoice shortly, and therefore it was their duty in their character of agents to retain the bill; for if they had transmitted it unaccepted, they would have incurred the useless trouble and expence of again writing to *Mowbray* and Co. It appears therefore that on the 11th *March*, *Mowbray* and Co. were apprized that the first bill was not accepted, and that the defendants did not mean to accept it until they received the invoice. If *Mowbray* and Co. however, had then meant to consider the detention of the bill as an acceptance, why did they not then say so? they were bound in honesty so to do, for if the defendants had made themselves liable as acceptors they would have been entitled, and ought to

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have had the opportunity to avail themselves of any funds in their hands belonging to *Brankston*, and might thereby have indemnified themselves against the liability which it is contended they had incurred as acceptors of the bill. Upon the whole it seems to me, that the silence of *Mowbray* and Co. from the 11th to the 27th *March*, was an assent on their part, that they would not consider the detention of the bill under the circumstances as an acceptance: and I am therefore of opinion, that the defendants are not liable as acceptors of the first bill: as to the other bill, the claim upon that was very properly abandoned by the plaintiff's counsel.

ABBOTT J. I am also of opinion that the plaintiffs in this case are not entitled to recover. It has been said that if the drawee detains a bill left with him for acceptance, for an unreasonable time, that such detention amounts in point of law, to an acceptance; and the opinions of some great and learned persons, entitled undoubtedly to the highest respect, have been cited in support of that doctrine. It is not however supported by the authority of any decided case; for the cases which have been referred to in the course of the argument have all been decided upon very special circumstances. Supposing however such a rule as that contended for to exist, it will be necessary in every case to inquire, whether the detention of the bill has been for more than a reasonable time, and the question of reasonable time will necessarily depend upon the facts of each particular case and the conduct of the parties. Now the facts in this case are shortly these: *Brankston* had been in the habit of selling wool to the defendants, and they of accepting

cepting his drafts for the amount; this *Mowbray* and Co. knew, and they knew also that the defendants would not accept such drafts until they received the carrier's voucher for the delivery of the wool to him. This was known to them in *August*; and at a subsequent period the first of these bills was sent. It is true that *Brankston* said that the carrier's receipt had been transmitted, but the reasonable conclusion is, that he had not transmitted it. Then how do *Mowbray* and Co. act? The defendants having received the first bill on the 27th *February* write on the 8th *March*, stating that they had not accepted it, and assigning their reason, and they then offer to return it if *Mowbray* and Co. should so require. Upon the receipt of this *Mowbray* and Co. do nothing; they neither say that they considered the defendants as having accepted the bill, nor do they desire to have it returned. By their silence then on that occasion they appear to me to have given judgment against themselves, for it very plainly shews that they did not then think the defendants answerable, but conceived that they had kept the first bill that length of time to ascertain whether *Brankston* would or would not send the goods. It was his duty, having taken the liberty to draw the bill, to forward the carrier's receipt, and that receipt not having arrived, the defendants cannot be said to have detained the bill an unreasonable length of time. For these reasons, even if the rule were as contended for by the plaintiffs' counsel (which I, by no means admit), still there is a contract between the parties themselves as to this particular case, and therefore under these circumstances I think that the defendants were not liable as acceptors of this bill.

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HOLROYD J. I am also of opinion that the plaintiffs are not entitled to recover. It appears to me that a mere non-feazance, that is, an omission to send back a bill which has been left for acceptance, does not of itself amount to an acceptance. Whether a refusal to deliver upon application a bill which has been left for acceptance will amount to an acceptance is another question; that would be more than a non-feazance, for it would be a tortious conversion of the bill. It is unnecessary however to decide that question; the present being a mere non-feazance: and except for the prior usage between these parties, there would have been no obligation whatever upon the defendants to return the bill sent to them, for *Mowbray* and Co. had no right to put the defendants to any trouble whatever. Now what is the effect of the usage as explained by the written correspondence? The utmost extent to which it goes is, that the defendants were to return the bills accepted, *provided they received the carrier's receipt*; that was their consideration for their accepting; and unless they received the carrier's voucher, there was no legal obligation on them to accept. Supposing however that it was competent to *Mowbray* and Co. to treat this as an acceptance or not as they thought fit, the question is, what have they done? Upon the first bill's not being returned, if they had then intended to consider the detention as an acceptance, why did they not say so? instead of that, they appear to me to have treated it as no acceptance, and they cannot then afterwards turn round and say they considered it as an acceptance. It appears to me therefore that, under the circumstances, *Mowbray* and Co. have treated this bill as if it were not accepted, and that the plaintiffs cannot now insist that the defendants are liable.

Judgment for Defendant.

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BODENHAM and PHILLIPS against PURCHAS the Elder. (a)

Friday,
Nov. 6th.

DEBT on a joint and several bond, dated 1st *January*, 1804, from the defendant and *N. Purchas*, the younger, to the plaintiffs, and *William Havard*, their deceased partner, in the penal sum of 9181*l.* 16*s.* 6*d.* Plea, after setting out on oyer, the bond and condition, the latter of which was “for repayment by the defendant, and *N. Purchas* the younger, or either of them, their or either of their heirs, executors, &c. unto the plaintiffs and *Havard*, their executors, &c. of a balance of 4590*l.* 18*s.* 3*d.*, with lawful interest, and also of such further sums as they the plaintiffs and *Havard* might advance or lend, remit or pay, to or on account or for the use of the *N. Purchas*, the elder, or *N. Purchas*, the younger, in the course of their business as bankers or otherwise, with interest, according to the usage and custom of their said business, not exceeding in the whole the said sum of 9000*l.*, without any deduction or abatement whatsoever;” first, non est

A bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor; one of the partners dies, and a new partner is taken into the firm; at that time a considerable balance is due from the obligor to the firm; advances are afterwards made by the bankers, and payments made to them on account by the obligor; the latter is credited by the

new firm with the several payments, and charged with the original debt and subsequent advances as constituting items in one entire account, and the balance due at the time of the partner's death is considerably reduced, and that reduced balance, by order of the obligor, is transferred by the bankers to the account of another customer, who, with his assent, is charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond: Held, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, that they were not at liberty so to treat it at a subsequent period; and that having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, that the bond was to be considered as paid.

Quære, Whether the transfer of the balance due from the obligor to the account of another, with his assent, did not, in point of law, operate as payment.

(a) This case was argued at *Serjeants' Inn*.

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factum, upon which issue was joined. Second, payment of the said sum of 4590*l.* 18*s.* 3*d.* and interest, and such further sum, &c., according to the condition of the bond. Replication to the last plea, that after making the bond, plaintiffs and *William Havard* did advance to defendant, in the course of their business as bankers, and otherwise, according to the usage and custom of their business, the sum of 4409*l.* 1*s.* 9*d.*; yet neither the defendant, or *N. Purchas* the younger, paid the said 4590*l.* 18*s.* 3*d.* mentioned in the condition, or such further sum of money, but that the whole 9000*l.* still remains unpaid and unsatisfied to plaintiffs. Rejoinder, that defendant and *N. Purchas* the younger, or one of them, did pay and satisfy to plaintiffs and to *William Havard*, in the lifetime of *William Havard*, and to plaintiffs since the death of the said *William Havard*, the said sum of 4590*l.* 18*s.* 3*d.*, in the said condition mentioned; and the said further sum of money so advanced to the defendant, as in said replication alleged; and upon this issue was joined.

At the trial of the cause at the *London* sittings after *Trinity* term, 1817, before Lord *Ellenborough*, a verdict was found for the plaintiffs for the penalty of the bond, subject to the award of an arbitrator, who by his award stated the facts of the case (as far as respects the point ultimately decided by the Court) to be as follows:

The action was brought by the plaintiffs, as surviving partners of *William Havard*, to recover 923*l.* and interest, upon the bond set out in the pleading, the execution of which was admitted. The plaintiffs and

their deceased partner, long prior to and at the time of the execution of the bond, and from thence until the 30th *April*, 1810, carried on business as bankers at *Hereford*, in the firm of *Bodenham, Phillips and Havard*, or *Bodenham, Phillips and Co.* On the 30th *April*, 1810, *Havard* died. The defendant during all the period above mentioned, kept an account with the plaintiffs and *Havard*, and usually balanced his accounts every three months, when he signed the ledger, and received his vouchers. On the 31st *March*, 1810, the balance was 2904*l.* 11*s.* 7*d.* in favour of the plaintiffs and *Havard* and on the 30th *April*, in that year, the defendant examined his account up to the 31st *March* preceding, received his vouchers, and signed the ledger as usual. On the 9th *April*, the plaintiffs and *Havard* advanced a further sum of 1500*l.*, which appears to have been the only transaction between the 31st *March* and *Havard's* death; so that on the death of *Havard*, the balance due from the defendant was increased to 4404*l.* 11*s.* 7*d.* Upon the death of *Havard*, the plaintiffs carried on the business, without making any alteration in their firm or their books, till the latter end of the year, when they agreed to take Mr. *John Garrett* into partnership, as from the 1st *July* preceding; but although the style of the firm was then changed to *Bodenham, Phillips and Garrett*, the accounts were continued in the same manner as before, and the balance continued as if there had been no alteration in the firm. And on *June* 30th, 1810, no notice was taken of *Havard's* death, but the account, including items both subsequent and prior to that event, was then settled, and the balance of 1420*l.* struck as if nothing had happened.

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factum, upon which issue was joined. Second, payment of the said sum of 4590*l.* 18*s.* 3*d.* and interest, and such further sum, &c., according to the condition of the bond. Replication to the last plea, that after making the bond, plaintiffs and *William Havard* did advance to defendant, in the course of their business as bankers, and otherwise, according to the usage and custom of their business, the sum of 4409*l.* 1*s.* 9*d.*; yet neither the defendant, or *N. Purchas* the younger, paid the said 4590*l.* 18*s.* 3*d.* mentioned in the condition, or such further sum of money, but that the whole 9000*l.* still remains unpaid and unsatisfied to plaintiffs. Rejoinder, that defendant and *N. Purchas* the younger, or one of them, did pay and satisfy to plaintiffs and to *William Havard*, in the lifetime of *William Havard*, and to plaintiffs since the death of the said *William Havard*, the said sum of 4590*l.* 18*s.* 3*d.*, in the said condition mentioned; and the said further sum of money so advanced to the defendant, as in said replication alleged; and upon this issue was joined.

At the trial of the cause at the *London* sittings after *Trinity* term, 1817, before Lord *Ellenborough*, a verdict was found for the plaintiffs for the penalty of the bond, subject to the award of an arbitrator, who by his award stated the facts of the case (as far as respects the point ultimately decided by the Court) to be as follows:

The action was brought by the plaintiffs, as surviving partners of *William Havard*, to recover 923*l.* and interest, upon the bond set out in the pleading, the execution of which was admitted. The plaintiffs and

their deceased partner, long prior to and at the time of the execution of the bond, and from thence until the 30th *April*, 1810, carried on business as bankers at *Hereford*, in the firm of *Bodenham, Phillips and Havard*, or *Bodenham, Phillips and Co.* On the 30th *April*, 1810, *Havard* died. The defendant during all the period above mentioned, kept an account with the plaintiffs and *Havard*, and usually balanced his accounts every three months, when he signed the ledger, and received his vouchers. On the 31st *March*, 1810, the balance was 290*l.* 11*s.* 7*d.* in favour of the plaintiffs and *Havard* and on the 30th *April*, in that year, the defendant examined his account up to the 31st *March* preceding, received his vouchers, and signed the ledger as usual. On the 9th *April*, the plaintiffs and *Havard* advanced a further sum of 1500*l.*, which appears to have been the only transaction between the 31st *March* and *Havard's* death; so that on the death of *Havard*, the balance due from the defendant was increased to 440*l.* 11*s.* 7*d.* Upon the death of *Havard*, the plaintiffs carried on the business, without making any alteration in their firm or their books, till the latter end of the year, when they agreed to take Mr. *John Garrett* into partnership, as from the 1st *July* preceding; but although the style of the firm was then changed to *Bodenham, Phillips and Garrett*, the accounts were continued in the same manner as before, and the balance continued as if there had been no alteration in the firm. And on *June* 30th, 1810, no notice was taken of *Havard's* death, but the account, including items both subsequent and prior to that event, was then settled, and the balance of 1420*l.* struck as if nothing had happened.

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verdict to be entered for the defendant, and if the Court should think that he was right in that opinion, or that the balance was discharged by any other means, his award was to stand. An application having been accordingly made on the part of the plaintiffs to set aside the award, the Court ordered the question to come on in the form of a special case, and it was argued by

Chitty, for the plaintiffs. The debtor not having specifically appropriated any of the payments to discharge the bonds, the creditors are at liberty to apply the same in discharge of the subsequent advances, and then the bond remains unsatisfied. For the rule of law to be collected from all the authorities, is this, that the debtor at the time of making payment, may apply the same in discharge of any debt he pleases; but if he makes no appropriation, then the creditor may at his election apply the same to the discharge of any one of several debts to the exclusion of the rest. *Kirby v. Duke of Marlborough* (a), *Peters v. Anderson* (b), *Bosanquet v. Wray* (c), *Hall v. Wood* (d), and this rule applies even in prejudice of a surety, *Plomer v. Long* (e). The award is founded upon *Clayton's case* (f). That was the case of an unsecured banking account, continued after the death of one of the bankers by his surviving partners, who as such, were liable to pay all debts incurred in the lifetime of their deceased partner. The question here arises upon a bond, conditioned not for the paying of one entire sum, but for securing such

(a) 2 M. & S. 18.

(c) 6 Taunt. 597.

(e) 1 Starkie, 153.

(b) 5 Taunt. 596. 1 Marshall, 238.

(d) 14 East, 243. note a.

(f) 1 Merivale, 572.

advances

advances as might from time to time be made. Such a bond therefore could not be satisfied by the first monies paid into the banking house by the obligors, for it was intended as a *continuing security*, for any balance that might at any time remain unsatisfied. To apply the doctrine of *Clayton's* case to this, would obviously contravene the intention of the parties themselves.

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Osborne contra, was stopped by the Court.

BAYLEY J. I cannot distinguish this in principle from *Clayton's* case. The decisions in the courts of law do not break in upon the distinction there taken. The principle established by those decisions is this, that where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases; but where the accounts are treated as one entire account by all parties, that rule does not apply. In this case the bond was given in 1801, for advances made or to be made in *Havard's* life-time; at his death, the balance due was 4404*l*. The surviving partners might then have called for payment of that sum, or they might have treated it as an insulated transaction, and kept that as a distinct and separate account; but instead of that, they blend it with the subsequent transactions; for in the first account delivered after *Havard's* death, are included several items, down to the 30th of *June*, and the payments after his death reduce the balance, at that time, to 1420*l*. They might even then have treated this balance as a distinct account, and as money due on the bond,

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bond, if they had so chosen; do they do so? look to the next account; the parties balance their accounts every three months, and in the next quarterly account, they bring forward the balance of 1420*l.*, and make it an item in one entire account, subsisting between these parties. The account goes on from 1810 till 1813; and the then balance is treated as one entire balance of one entire account, as the result of all the transactions between the parties in the intermediate time. The plaintiffs were not bound to have so treated it at *Howard's* death, but having done so, there is not any authority for saying that they are now at liberty to apply the several payments in reduction of the debt incurred by the subsequent advances, to the exclusion of the bond debt. It certainly seems most consistent with reason, that where payments are made upon one entire account, that such payments should be considered as payments in discharge of the earlier items. *Clayton's* case, where all the authorities were fully considered by the Master of the Rolls, is directly against the plaintiff's right to make any such appropriation as he desires. That case does not break in upon any of the cases at law, and ought to govern our decision in the present instance, and I am therefore of opinion that there ought to be judgment for the defendant.

ABDOY J. I am also of opinion, that the plaintiff is not entitled to recover. I think that this question is decided by *Clayton's* case, which was very fully argued. All the decisions were there before the Master of the Rolls, and he pronounced judgment against *Clayton*. It was a case decided upon great consideration, and is an authority of great weight. This case in principle is

is exactly the same. There it was holden, that payments made by surviving partners to *Clayton*, with whom there was a general account, should extinguish the old debt: here the converse of the proposition applies, and the payment by the debtor, to the surviving partners from time to time, upon one general account, including the old debt to the plaintiff and *Haverd*, must, upon the same principle, extinguish that debt. The Master of the Rolls says, "In such a case" (that is a banking account) "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts." The principle of that decision governs the present, and there must therefore be judgment for the defendant.

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HOLROYD J. It seems to me, that the transfer of the balance of the defendant's account, by the plaintiffs to the son, may be considered as the payment of so much money by the son, on account of the father, to the banker, and a reloan by them of the same sum to the sons. In *Wade v. Wilson* (a), which was an action for penalties for taking usurious interest, the declaration stated the loan to be from the defendant to one *Goulton*. The evidence was, that *Goulton* owed *Flintoft* money on

(a) 1 East, 195.

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bond, and that the latter was indebted to *Wilson*; and that it was agreed between the several parties, that *Wilson* should accept *Goulton* as his debtor, instead of *Flintoft*; *Goulton* accordingly gave his promissory note to *Wilson* for the sum therein specified, with 5 per cent. interest, and, in addition to that, paid a premium to *Wilson*. It was objected, that there was not any loan of money from *Wilson* to *Goulton*; but that this was the mere substitution of one debt for another. The Court, however, held, that this constituted a loan from *Wilson* to *Goulton*, from the period of the date of the promissory note. The principle upon which that decision took place, must have been, that the acceptance of *Goulton*, as the debtor, instead of *Flintoft*, operated as the payment of the debt of the latter; for if that debt were not paid, there could have been no loan from *Wilson* to *Goulton*. That case, therefore, would seem to shew that the mere transfer by the bankers of the father's debt to the sons' account with their assent, operated as a payment of the father's debt by the sons, and a reloan of the same sum to the latter by the bankers. It is unnecessary, however, to decide the question upon that ground; for *Clayton's* case, which seems to me to have been decided upon the soundest principles, is exactly in point with this, and ought to govern our decision; and, upon the authority of that case, I am of opinion, that there ought to be judgment for the defendant.

Judgment for defendant.

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OSMOND *against* WIDDICOMBE. (a)Friday,
Nov. 6th.

ASSUMPSIT for tolls. Plea, non-assumpsit. The cause was tried at the *Middlesex* sittings after *Trinity* term, 1817, when a verdict was found for the plaintiff, with 1s. damages, subject to the opinion of the Court, on the following case:

The plaintiff is farmer of the tolls on the *Totness* turnpike road collected at *Teign-bridge* gate in the parish of *Highwich* in the county of *Devon*, and on the 3d of *February*, 1815, the defendant passed along the turnpike road, for the space of one mile, and through the gate, with a cart drawn by two horses, and was then solely employed in carrying materials for rebuilding *Teign-bridge*, which is situate in the *Totness* turnpike road, between *Newton Abbott* and the city of *Exeter*. *Teign-bridge* is a county bridge, and had been directed to be rebuilt by an order of the justices assembled at the general quarter sessions of 'the peace for the county, The plaintiff demanded of the defendant a toll of 1s., being the legal and accustomed toll for a cart drawn by two horses, for the said cart and two horses then driven by defendant passing through the said gate, which the defendant refused to pay. The question for the opinion of the Court was, whether under these circumstances the defendant was liable to the toll.

The case was argued by *Hutchinson* for the plaintiff, and *Denman* for the defendant, but the Court in giving judgment, stated most of the arguments which were

A bridge is not a highway within the meaning of the 13 G. 3. c. 84. s. 60., by which carriages employed in carrying materials for the repair of any turnpike road or public highway, are exempted from toll; and therefore toll is payable for a carriage employed in carrying materials for the repair of a bridge along a turnpike road.

(a) This case was argued at *Serjeants' Inn*.

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used, and which turned only on the construction of the particular clause of the act. They have therefore been omitted.

BAYLEY J. The question in this case is, whether a person carrying materials for the repair of a bridge along a turnpike road, is exempted from the payment of toll, and that depends upon the construction of the stat. 13 G. 3. c. 84. s. 60. That clause states, "that no toll shall be collected or received at any toll-gate, for or in respect of carriages solely employed in carrying materials for the repair of any turnpike road or *public highway*, or for going to such employment, or returning after having been so employed." The argument in favour of the exemption is, that a bridge is a public highway within the meaning of this section. It is, however, to be observed, that long before this act of parliament passed, there existed separate systems of laws applicable to bridges and to highways; and in addition to these, several turnpike acts had been passed. The stat. 22 H. 8. c. 5. imposed the burden of the repair of bridges on the county, the 13 G. 3. c. 78. related to parochial highways; and the 13 G. 3. c. 84., which passed in the same session, applied to turnpike roads, so that it appears these were all distinct subjects of legislative provision. Now, if it had been intended to include bridges in this exemption, one should have expected that, like turnpike roads and highways, they would have been expressly mentioned. Besides it must be recollected, that the damage done to a turnpike road from the carriage of materials for the repairs of bridges, would from the very nature of those materials, be greater than that arising from the carriage of those necessary for the repair of a road, and so a heavier burden

burden would be taken from the larger body, the inhabitants of the county, and thrown on the parish or the trustees of the road. The 43 G. 3. c. 59. throws some light upon the subject, for the first section of that act empowers the surveyors of bridges, to get materials for the repair of bridges in the same manner as surveyors of highways, under the 13 G. 3. c. 78. The legislature, therefore, seem to have considered a bridge as distinct from a highway, and as not included in that term, as used in the highway act. I am therefore of opinion, that as the legislature has treated bridges and highways as distinct and separate subjects of legislative provision, that the former do not come within the term highway, used in this clause of exemption; and therefore that there must be judgment for the plaintiff.

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—
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ABBOTT and HOLROYD Js. concurred.

Judgment for Plaintiff.

MAXWELL against JAMESON. (a)

Friday,
 Nov. 6th.

ASSUMPSIT for money paid, &c. by plaintiff for use of defendant. At the trial before *Wood* Baron, at the *Northumberland* assizes, 1817, a verdict was found for the plaintiff for 18*l.* 2*s.* 3*d.* subject to the opinion of the Court on the following case.

One of the makers of a joint and several promissory note, after the same had become due, gave his bond to the holder for the amount; but before the com-

mencement of the action no money was actually paid on the bond: Held that, until he had paid money upon the bond, he could not maintain an action for money paid, in order to recover contribution against any of the other makers of the original note.

(a) This case was argued at *Serjeants' Inn*.

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On the 9th *August* 1814, *Maxwell, Jameson*, and two others gave the following promissory note to *Batson and Co.* who were bankers at *Berwick-upon-Tweed*: "Six weeks after date we jointly and severally promise to pay to Messrs *Batson and Co.* or order at the *Tweed Bank* here the sum of 70*l.* for value received." On the 10th *March* 1816, *Maxwell* took up the note in question giving his own bond to *Batson and Co.* for the amount conditioned for payment on the 29th day of *September* 1816. No money was, however, in fact, paid by the plaintiff to *Batson and Co.* either on account of the bond or the note, before the commencement of this action.

The question for the opinion of the Court was, whether, under the circumstances, this action for money paid to the defendant's use could be maintained.

Reader, for the plaintiff. The question in this case is, whether the plaintiff, having only given a bond, can be said to have paid money, so as to entitle him to call upon the defendant for contribution in this form of action. And it is not distinguishable from *Barclay v. Gooch* (a), where, though no money actually passed, but a note only was given, yet the Court held it to be a sufficient payment, because the party who might have enforced payment, accepted the note as money. *Israel v. Douglas* (b) is also an authority to shew that this form of action may be maintained without any money having actually passed between the parties. The case of *Taylor v. Higgins* (c) may perhaps be urged as an authority against this doctrine, but there the bond was

(a) 2 *Esp. N. P. C.* 571. (b) 1 *H. Bl.* 239. (c) 3 *East*, 169.

given

given by a third person. And as the original debt, which was also on a bond, was not extinguished, and no money was paid, no action, as for money paid, could on that account lie. But in this case the original debt is actually extinguished by the bond, and therefore the bond is, in fact, so much money paid to the defendant's use, since the person to whom the debt is due, elects to take the bond in lieu of actual payment. The question too in *Taylor v. Higgins* arose on an affidavit to hold to bail, where the Court requires the cause of action to be stated with great accuracy.

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Richardson, contra. This action is not maintainable: if any action lie, it must be for money paid; but as no money has, as yet, been paid, the action cannot now be sustained. *Barclay v. Gooch* is a mere nisi prius decision; but even in that case, the payment was by a promissory note, which is often treated as money in the ordinary transactions of business. A bond, however, stands on a different footing; because that is simply a security for a debt, and cannot be considered as cash. And this distinction was taken in *Taylor v. Higgins*, for that case did not turn on the question whether the giving of the bond operated as an extinguishment of the original debt, but whether it amounted to payment. The case of *Israel v. Douglas* proceeded entirely on the ground of consent. There *A.* was indebted to *B.* and *B.* to *C.*, and it was agreed between all three that *C.* should take *A.* as paymaster; there it was held that an action would lie against *A.* because he had agreed to hold the money which he owed to *B.*, to the use of *C.* An equivalent for money is not however, in all cases, considered as money; thus stock is not so considered, *Nightingal v.*

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Devoisme (a), *Jones v. Brinley* (b). And to complete the offence of usury, where either money or money's worth must be received by the lender, a promissory note, which gives only a right of action, has been held not sufficient for that purpose, *Maddock v. Hammett* (c). So goods cannot be considered as money, *Moore v. Pyrke* (d); except where all parties agree to consider them as such: but in this case there is no such agreement.

BAYLEY J. The first impression on my mind was, that the Court might properly consider the extinguishment of the debt in this case, as equivalent to money paid by the plaintiff for the use of the defendant, and, on this ground, that the bond was given as money, and that the defendant had the benefit of it as money; but, on considering the circumstances, and adverting to the case of *Taylor v. Higgins* which has been cited, I now think that this action is not maintainable. The plaintiff in this case has paid no money. It is said, indeed, that he has given what was equivalent to it, and that it ought to be considered for this purpose as money, and so it was held in *Barclay and Another v. Gooch* (e). But in *Taylor v. Higgins* the Court, having the former case before them, held that the action for money paid could not be maintained. There are, therefore, at all events, conflicting authorities on this point, the last of which is in favour of the defendant. In *Taylor v. Higgins* the old bond was delivered up, and the new one accepted as payment and satisfaction of the old debt. And there Lord *Ellenborough* says, "There is no pretence for considering the giving of this new security as

(a) 5 Burr. 2589.

(b) 1 East, 1.

(c) 7 Term Rep. 184.

(d) 11 East, 52.

(e) 2 Esp. N. P. C. 571.

so much money paid for the defendant's use." Then as the authorities differ, it becomes necessary to look to the reason of the thing. No money has yet come out of the plaintiff's pocket, and non constat that any ever will; for if he recovers from the defendant in the present action, still it is possible that he may never pay it over to *Batson* and Co. Then the period of time at which his remedy against the defendant shall commence has not yet arrived. If hereafter he is compelled to pay the money due upon the bond, he may then have his remedy against Jameson for his contribution.

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ABBOTT J. Even supposing that the plaintiff has in this case entirely relieved the defendant from the demand which *Batson* and Co. had against him, (which may be doubtful,) still he will then have done no more than was done by the plaintiff in the case of *Taylor v. Higgins*, yet the Court there held, after much consideration, that the giving of a new security which extinguished the old debt was not the same thing as payment. This case is precisely like that, and I think our decision ought to be governed by it. *Moore v. Pyrke* is also to the same effect, for there also the debt was extinguished by the seizure of the goods, but not paid by the plaintiff in money. Although, therefore, the first impression on my mind was the same as that of my Brother *Bayley*, yet, on further consideration, I am satisfied that this action cannot be maintained.

HOLROYD J. I am of the same opinion. In order to support this action the debt must have been extinguished either by an actual or a virtual payment of money by the plaintiff to the defendant's use. There has clearly been no actual payment; and in order to

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have made the giving of the bond operate as a virtual payment, the defendant must be shewn to have been a party to that transaction; which was not the case. The case cited of *Taylor v. Higgins* is quite similar to the present; and unless we overturn it we must hold that the plaintiff in this case is not entitled to recover.

Judgment for defendant.

Friday,
Nov. 6th.

LEWIS *against* MORLAND. (a)

An attachment for non-payment of money is in the nature of mesne process; and where the party had been taken and permitted to go at large and returned again into custody, and continued in custody at the return of the writ; it was held that the sheriff was not liable to an action for an escape.

DEBT against the defendant, sheriff of *Kent*, for an escape. The first count of the declaration stated, that the plaintiff was an attorney in an action, in which *Thomas Inge* was plaintiff, and *Elizabeth Terry* defendant; and that, by a rule of *Trinity Term*, 1816, it was ordered by this Court, that it should be referred to the Master, to see what was due from *Inge* to the plaintiff, for his bill of costs; and that *Elizabeth Terry*, or her attorney, should pay such costs to the plaintiff. The declaration then stated the Master's allocatur, by which he certified that 221*l.* was due from *Inge* to the plaintiff; and that in *Trinity* term, 1817, another rule was pronounced, that an attachment should issue against *Terry* for that sum: it then proceeded to state, that on the 3d *February*, 1817, a writ of attachment, returnable on *Thursday* next after the morrow of *All Souls*, was issued and delivered to the defendant, commanding him to attach the said *Elizabeth Terry*, so that he might have her in court, to answer for certain trespasses and contempts brought against her in the

(a) This case was argued at *Serjeants' Inn*.

Court

Court of *King's Bench*; that such writ was indorsed "issued against the said *Elizabeth* for her contempt for not paying the above sum pursuant to a rule of Court, and the Master's certificate thereon with costs of attachment." The caption of *E. Terry* under the writ, and her escape, were then stated in the usual manner. Plea nil debet. At the trial before Lord *Ellenborough*, at the *Middlesex* sittings, after last *Hilary* term, the jury found a verdict for the plaintiff, for the debt, and 1s. damages, subject to the opinion of the Court on a case which set out the different rules of Court, as stated in the declaration, and the Master's certificate thereon, and stated the issuing of the writ of attachment with the following indorsement upon it: "By rule of Court, for her contempt in not paying the sum of 221*l.* pursuant to a rule of Court, and the Master's certificate thereon, with costs of attachment." The case then proceeded as follows. The above writ was delivered to the present defendant (who then was, and, till the time of its return, continued to be sheriff of *Kent*) to be executed; and he accordingly made his warrant on the writ, directed to *Thomas Sear*, his officer, who on the 5th *July*, 1817, arrested *E. Terry*, but on the same day suffered her to escape, although before the return day of the writ she returned into the custody of the defendant, and continued in such custody at the return day. The question for the opinion of the Court was, whether these facts amounted to a defence at the trial; if so a nonsuit was to be entered, otherwise the verdict was to stand.

Chitty, for the plaintiff. The action of debt for escape is given by the stat. 1 *R.* 2. c. 12.; and although

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though in terms that statute does not apply to an escape upon an attachment issued upon a rule of this Court, yet such a case comes fairly within the object there embraced. That statute and the stat. of *Westm. 2. c. 11.* (13 *Edw. 1.*) have been construed liberally (a); and in *Platt v. Lock* (b), it was held, that although the stat. of 1 *R. 2. c. 12.*, only mentions the warden of the *Fleet*; yet the sheriff and every other jailor, is liable to an action. So, although the statute of *Gloucester, c. 5.* mentions only persons who hold for term of years, yet a tenant for half a year is within the statute, notwithstanding it is a penal law. (c) The enactment in the statute of 1 *R. 2. c. 12.*, “that no warden of the *Fleet* shall suffer any prisoner, there being by judgment, to go out of prison,” is not to be considered as confined to a prisoner in custody upon a formal judgment, but as extending to a case of this nature. In construing the enactments, the object of the legislature is to be considered. The distinction between an escape on mesne process, and on final process, is obvious. Where the escape is on mesne process, it is uncertain whether the demand of the plaintiff will be established; but when a judgment has been pronounced in his favour, the debt can no longer be disputed. In the first case, therefore, the plaintiff is put to his remedy by action on the case; in the latter his remedy is specific. A rule absolute for an attachment for non-payment of costs, is in every respect equivalent to a judgment; it is a final determination of the matter. The statute of 1 *R. 2. c. 12.* speaks of persons “judged to prison,” as if the same

(a) 2 *Inst.* 382.(b) *Plowd.* 35.(c) *Co. Litt.* 54 b.

applied

applied to every case where the party was in prison by order of the Court. The attachment which issues pursuant to the rule, is therefore in the nature of execution, and accordingly a person in custody, upon an attachment for non-payment of costs, has been held to be entitled to his discharge under the Lords' act (a), as being a person charged in execution within the meaning of that act. *Rex v. Stokes.* (b) And this decision has been confirmed by several subsequent cases. (c) In the case of the sheriff of *Bristol* (d), debt was held to lie for the escape of a person in custody, under a commitment by commissioners of bankrupt. And this case is cited and recognized by Lord C. B. Comyn, in his digest, tit. *Escape*, B. 1. So debt lies for an escape of a person in custody under a *capias pro fine* for denying his deed, for such *capias* operates as well for the plaintiff as the King. (e) But the case of *Phelps v. Barrett* (f) is an express authority, to shew that an attachment issuing out of a court of law for non-payment of costs, is in the nature of, and in effect an execution, and that a bail bond taken by the sheriff in such a case is void. There all the other authorities were before the Court of *Exchequer*, and they pronounced judgment upon this very point. Upon principle, therefore, as well as authority, the writ of attachment is in effect an execution, and in that case the sheriff is liable for the escape.

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Parke, contra. This action cannot be maintained, because *Elizabeth Terry* returned into the custody of the defendant, before the writ of attachment was re-

(a) 32 G. 2. c. 28. s. 13.

(b) *Cowp.* 136.(c) *Tidd's Prac.* 375.(d) *Moore*, 834.(e) 1 *Roll. Abr.* 810. *Garnon's case*, 5 *Rep.* 88.(f) 4 *Price*, 23.

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turnable. The form of the writ of attachment is, "to answer to us for certain trespasses and contempts," and the distinction is between writs of execution, and writs on mesne process. In the former cases, the sheriff is liable if the defendant be at large at any time, but in the latter, it is sufficient if he bring in the body on the return day of the writ, *Hawkins v. Plomer* (a), *Atkinson v. Matteson*. (b) In the sheriff of Nottingham's case (c), it was agreed by the Court, that upon an escape upon mesne process, the writ ought to surmise ad largum ire permisit, et non comperuit ad diem; because, the party beingailable, the sheriff might lawfully suffer him to go at large; but if the caption be under a writ of execution, there ad largum ire permisit is sufficient, because a defendant in custody upon a writ of execution, cannot be retaken after an escape. *Platt v. Lock*. (d) An attachment out of chancery is clearly in the nature of mesne process, because a sheriff may take bail upon it; *Studd v. Acton* (e); and although it was held in *Field v. Workhouse* (f), that on an attachment for contempt out of C. P., bail could not be taken, no reason is assigned for that determination. In *Burton v. Low* (g), a bond given to the sheriff to appear upon an attachment out of chancery, was held to be within the statute. *Waddington v. Fitch* (h), is not an authority against the defendant. For in that case, if the plaintiff, instead of demurring to the defendant's plea, had replied, the action might have been maintained. Bail may be taken on an attachment for contempt out of

(a) 2 Blac. Rep. 1048.

(b) 2 Term Rep. 176.

(c) Noy. 72.

(d) Plowd. 36.

(e) 1 H. Blac. 468. Tidd's Prac. 226.

(f) Com. Rep. 264.

(g) Styles, 234.

(h) Barnes, 64.

this

this court, *Rex v. Daves*. (a) So it may be on an attachment for contempt out of chancery, *Morris v. Hayward*. (b) It is unnecessary however to contend that the sheriff may take bail; it is sufficient if he have the party at the return of the writ. It is a different thing to say, that the Court will not enforce the bail bond if the party does not appear, and to say that the sheriff does not do his duty if he have the party at the return of the writ. There is a distinction between a writ of execution, and an attachment which is only meane process; although two terms intervene between the teste and return of the former, yet it is good; but in meane process, if a term be omitted, the writ is void, *Shirley v. Wright*. (c) A writ of attachment was formerly considered as process purely criminal, and interrogatories were administered, *Cecil's case* (d), *Ex parte Whitchurch*. (e) A rule is not a record, but only a remembrance, *Wynne v. Wynne*. (f) A commitment is not a record, *Wigley v. Jones* (g), and a rule upon a defendant to pay costs, does not constitute a debt, *Emerson v. Lathley*. (h) So a person in custody on an attachment for non-payment of money is not entitled to his discharge under the 48 G. 3. c. 123., that being confined to persons in execution upon any judgment, *Rex v. Hubbard*. (i)

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 Lewis
 against
 Mobland.

BAYLEY J. It seems to me quite clear that the plaintiff is not entitled to recover. The action for an escape is founded upon a supposed wrong of the

(a) 1 *Ld. Raym.* 722. 2 *Salk.* 608. *Com. Dig.* tit. *Bail*, F. 8.

(b) 2 *Marsh.* 280. 6 *Trent.* 569.

(c) 2 *Salk.* 700. 2 *Ld. Raym.* 775. (d) 12 *Mbd.* 348.

(e) 1 *Atk.* 55.

(f) 1 *Wils.* 40.

(g) 5 *East.* 440.

(h) 2 *H. Blac.* 248.

(i) 10 *East.* 408.

sheriff,

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sheriff, producing damage to the party at whose suit the debtor was in custody. To entitle the plaintiff to maintain this action, it must be shewn that the sheriff has been guilty of a breach of duty. Now his duty is prescribed to him by the writ, the language of which is, "we command you, that you do not forbear by reason of any liberty in your bailiwick, but that you attach *E. Terry*, so that you may have her before us at *Westminster*, on *Thursday* next after the morrow of *All Souls*, to answer to us for certain trespases and contempts brought against her in our court before us, and have you then there this writ." All, therefore, that is required by the writ is, that the sheriff should attach the party, and have her in court at the return to answer. The sheriff would fully discharge his duty by producing the party at that time, and the object of the Court would be satisfied. It is true, that in addition to this mandate of the Court, there is an indorsement on the writ, the purpose of which is to regulate the conduct of the sheriff as between the parties to the suit; but this forms no part of the writ itself, nor is it authorized by the Court. The object therefore of this writ being, to bring the party into court to answer, it is in the nature of mesne process. The nature of final process or execution, on the other hand, is to satisfy the plaintiff. The attachment issues upon the ex parte affidavit of the person who demands the money awarded to be due by the master's allocatur, stating that the same has not been paid. If that were final process, there would be nothing further to be done by the Court but to commit; but that is not the practice, for interrogatories are filed to be answered, and the Court ultimately pronounce upon those answers, whether the party is to be

committed for contempt or not; for then only, and not before, does commitment take place. In the mean time, it is the usual course to admit the party to bail, and if on the return he may be bailed, it would be most singular that the sheriff should be bound to keep him in close custody, especially as it might appear that the charge was unfounded, or that the writ had been served on the wrong person, or that after the issuing of the writ, payment had been already made to an agent, duly authorized to receive the same. And it seems to me, that it would be most mischievous if the doctrine contended for could be supported; for the sheriff in that case would not be at liberty to take security for the party, but would be bound always to keep him in close custody. The case of *Morris v. Hayward* is an authority to shew, that although the sheriff is not bound to take bail upon an attachment, still if he does, he may recover upon the bail bond. That indeed was the case of an attachment, out of chancery, but process issuing out of courts of law and equity stands on the same foundation. That case was decided upon great consideration, and is at variance with the subsequent case of *Phelps v. Barrett*, the foundation of which was, that an attachment is a process in the nature of execution. But for the reasons I have already given, it seems to me, that an attachment is in the nature of mesne process, and that the principle on which that decision took place cannot be supported. The sheriff therefore having had the defendant in custody at the return of the writ, I am of opinion that this action cannot be maintained.

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ABBOTT, J. If it were necessary to decide whether a bail bond taken by the sheriff in such a case as this were a valid instrument, I should have wished for further time to consider that question. But it is unnecessary in this case to pronounce any judgment upon that point; for supposing the sheriff to be guilty of a breach of duty, in letting the party out of custody, it does not thence follow that an action may be maintained against him for such neglect of duty. If it were altogether a case of criminal process, the sheriff would not be liable to an action; and even supposing that the person to whom the money was payable could maintain such action, it would be an answer thereto either to prove payment, or to shew that the sheriff had the defendant in custody at the return of the writ. It has been said, that an attachment is in the nature of process of execution; there is however this material difference, that upon a *ca. sa.* the defendant, upon being brought into court, is committed immediately, whereas in this case the Court are not bound to commit, but may and generally do admit the party to bail; he is then to answer interrogatories, and it depends upon his answers, whether he can purge himself of the contempt, and whether he is ultimately committed or not. This constitutes an essential difference between this species of process, and that of process in execution. It has been urged, that in favour of insolvent debtors, an attachment is considered as in the nature of execution, and therefore that it ought to be so considered in this case. But that act being passed to relieve persons in custody for debt, receives, in favour of liberty, a very large and liberal construction; and those cases, therefore, bear no analogy to the present. Upon the whole,

I am of opinion, that this is not in the nature of process in execution; and even supposing an action might in some cases lie against the sheriff for the escape of a person upon an attachment, that it would not in this instance, as the sheriff had the party in custody at the return of the writ.

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HOLROYD J. I am of the same opinion. In form the attachment is a criminal process, for it commands the sheriff to attach the party for certain trespasses and contempts; and if it be considered as a criminal proceeding only, it is perfectly clear that the plaintiff could not have any ground of action. Inasmuch, however, as the non-payment of money creates a civil right, the attachment which issues to enforce such right, is considered as in the nature of civil process. Now, process is of two sorts, mesne process and final process. The object of mesne process is, to compel the appearance of the party in court, to answer the charge made against him; the object of final process, is to satisfy the plaintiff in the suit. The attachment in this case issues in pursuance of the master's certificate, and is an order, not to keep the party in custody, but only to attach him, so that the sheriff may have his body to answer. It is not absolutely to punish the party for the contempt, nor at all events even to enforce payment, but only to compel the party to answer, that further inquiry may be had. This is therefore clearly in the nature of mesne process, and is not analogous to a *ca. sa.* where a party is brought into court to satisfy his debtor, and that being so, it is perfectly clear that the sheriff having had the party in custody at the return of the writ, is not liable to an action for an escape.

Judgment for the Defendant.

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Friday,
Nov. 6th.HOLLINSHEAD and Another *against* The Company of Proprietors of the LEEDS and LIVERPOOL CANAL. (a)

A canal act directed, that no boat navigating therein, which should not be capable of carrying a greater burden than twenty tons, or which should not have a loading of twenty tons on board, should be allowed to pass through the locks, unless on payment of tonnage equal to a boat of twenty tons: Held that this was not confined to boats carrying some loading, but that empty boats came within the meaning of the clause, and that for them toll was payable as on boats having a loading of twenty tons. Held also, that the act having imposed different rates of toll on different goods carried along the canal, the tonnage on an empty boat was to be calculated at the lowest rate applicable to any species of goods.

ASSUMPSIT to recover back certain sums of money demanded and taken by the defendants, as and for the tonnage rates on certain boats of the plaintiffs, for passing through certain locks on their navigation. The cause was tried at the *Lent* Assizes, 1817, at *Lancaster*, before *Bayley* J., when the jury found a verdict for the plaintiffs, subject to the opinion of this Court on the following case.

The tonnage in question was claimed for the passage of the boats of the plaintiffs, over certain parts of the *Leeds* and *Liverpool* Canal and *Douglas* Navigation, the rates of which tonnage were fixed and ascertained by the statutes 6 G. 1. c. 10, 10 G. 3. c. 114, 23 G. 3. c. 47, 30 G. 3. c. 65, and 34 G. 3. c. 94. On the 6th *January*, 1817, the plaintiffs, being proprietors or lessees of certain coal mines, situate at *Orrell*, in the county of *Lancaster*, about three miles to the west of *Wigan*, and near to the *Douglas* Navigation, shipped from the mines on the navigation, 38 tons of coal on board their own boat, No. 22. The boat proceeded therewith on the *Douglas* navigation, and through certain locks thereon to *Newborough*, and from thence on the *Leeds*

(a) This case was argued at *Serjeants' Inn*.

and

and *Liverpool Canal to Liverpool*, (in which part of the canal there are no locks, the same being upon one and the same level,) where the appropriate tonnage rates on the 38 tons of coal, for such passage on the said navigation and canal, were paid by the plaintiffs to the defendants. The boat was usually employed in carrying and conveying coals from *Orrell to Liverpool*, upon the said canal and navigation; it was also capable of carrying a greater burthen than twenty tons, and did exceed fourteen feet in width. The boat wholly discharged the coals at *Liverpool* and returned empty, (except that there was a person on board to navigate such boat, and the necessary food and apparel and bedding for such person) from *Liverpool*, along the *Leeds and Liverpool canal to Newborough*, and from thence along the *Douglas Navigation*, towards *Orrell*, for the purpose of being again employed in carrying coals to *Liverpool*, upon the navigation and canal. When the boat arrived at the first lock upon the *Douglas Navigation*, called *Apley Lock*, the company refused to permit the boat to pass such lock, unless the sum of 3*l.* 15*s.* was paid to them, being the amount of tonnage on the twenty tons of coal navigated upon the canal and navigation from *Liverpool to Orrell*. The plaintiffs not being able, by reason of the refusal, to pass the lock without paying the said sum of 3*l.* 15*s.* claimed by the defendants, did, in order to pass such lock, pay the defendants the sum of 3*l.* 15*s.*, under protest and with notice that an action would be brought against them to recover it back. No question however was made as to the correctness of the amount of the sum claimed by the defendants, but it was agreed between the parties, that if the Court should be of opinion that any ton-

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nage was due under the circumstances, the verdict should be entered for the defendants.

The following was the clause on which the claim of the defendants was founded, 23 G. 3. c. 47: “ And be it further enacted, that no boat or other vessel, navigating upon the said intended canal from *Leeds* to *Liverpool*, on the river *Douglas*, alias *Asland*, or upon any of the cuts or canals made or which shall be made by virtue of or under the authority of the said first recited act, or for opening a communication by water between the said river *Ribble* and the said town of *Wigan*, or any of them, which shall not be capable of carrying a greater burthen than twenty tons, or which shall not have a loading of twenty tons, shall be allowed to pass through any of the locks already made, or which shall hereafter be made upon the said navigation, or any of them, without the consent of the said company of proprietors, or their principal agent for the time being in writing first had and obtained, or unless the owner or navigator of such boat or vessel, shall pay tonnage equal to a boat or vessel of twenty tons.” The following clause was contained in a former act, 10 G. 3. c. 114, relating to this canal, and had been repealed: “ And be it further enacted, that no boat or other vessel of less burthen than twenty tons, shall pass through any of the locks to be made by virtue of this act, without the consent of the said company of proprietors or their principal agent for the time being in writing first had and obtained, or unless the owner or navigator of such boat or vessel shall pay tonnage equal to a boat or vessel of twenty tons.” The 23 G. 3. also contained a clause, giving to the owners of lands adjacent to the canal, the right of passing the

locks in their pleasure-boats, on paying a toll as for a tonnage of 15 tons. The tolls were imposed by the act specifically on the different sorts of goods carried at so much per ton, and different goods paid different rates of tonnage.

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Hollinshead for the plaintiffs. The canal by the statutes empowering the company to make it, is dedicated to the use of the public, who have a full right at their pleasure, to navigate thereon, subject only to the payment of such tolls, as the company by the act of parliament are empowered to take. It differs in no respect from a bridge built by subscription or a turnpike road, where similar rights are enjoyed by the public. If then the acts impose no tolls, the public may go freely. That is the case here; there is no clause in any of the acts applicable to this navigation, which imposes any toll on the boat; all the tolls are imposed on the different cargoes, which are subject to different rates of payment. Then, if the rate be on the cargo only, an empty boat can be subject to no rate at all. The clause relied on by the other side, must be construed as applicable only to burthened boats; for on such only were there any tolls imposed by the previous parts of the act. It is said there is no exception of empty boats; but that was not necessary in a case where they were not included in the original liability. Besides, at what rate of tonnage are they to be charged? for boats laden with different goods, pay different rates; and it seems an insuperable difficulty to ascertain, if empty boats are chargeable at all, at what rate to charge them. There is no reason why they should be liable to one rate rather than the other. This therefore affords a strong argument that they are not charge-

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able at all. The true rule of construction in cases of this sort, is laid down by Lord *Ellenborough* in *Gildart v. Gladstone in error* (a), that where the words fairly admit of doubt, a construction in favour of the public, and adverse to the company, shall prevail.

Tindal, contra, after adverting to the fact, that a greater loss of water was occasioned by the passage of an empty than of a laden boat, and that the toll was intended as a compensation to the company for this loss, contended that a canal was not like a turnpike road open to all persons to pass freely, but appropriated to persons using it for purposes of trade, and that this most distinctly appeared, from the introduction of a special clause, enabling pleasure-boats belonging to particular individuals to pass on certain terms.

He was then stopped by the Court.

BAYLEY J. It seems to me impossible not to include empty boats within the express words of the clause in question, and they are most clearly within its meaning and policy. This navigation was, by the original act 10 G. 3., made free for all persons whatsoever, for the purpose of conveying different goods thereon; and it is free only for those purposes. Then sect. 55. of that act provides, "that no boat of less burthen than twenty tons shall pass through any lock without the consent of the company or unless the owner shall pay tonnage equal to a boat of twenty tons." Now the grounds for this payment are, the trouble which the company have in opening the gates, and the loss of water they thereby sustain; and these reasons will

(a) 11 E. 685.

apply

apply even more stongly to empty than to laden vessels, because the former occasion a greater loss of water than the latter. But it is said that the public have a right freely to pass along the canal, for all purposes whatsoever; if that were so, what reason can be assigned why pleasure-boats should be expressly permitted to pass subject to a particular payment on going through a lock? And besides, even that permission is given, not to the public at large, but only to the owners of the adjacent lands. The public, therefore, have no general right of passage, but only for the purpose of carrying goods along the canal. Then the 25th section of the 28 G. 3., which is the clause on which this question turns, goes further than the clause I have before mentioned of the 10 G. 3., and, as it seems to me, clearly comprehends this case. The former clause only applied to boats which were under twenty tons burthen, without at all considering how they were laden; but it being obvious that vessels capable of carrying more than twenty tons did the same injury to the navigation, when they passed with less than that burthen, as vessels that could not carry twenty tons, this latter provision was introduced, that no boat whatsoever should be at liberty to pass without paying a tonnage on twenty tons, both in the case where the boat was not capable of carrying twenty tons, and where, though capable of carrying that burthen, she had not a loading to that extent on board. And I think that the boat in the present case comes under this latter description. But this difficulty is suggested, that it is not possible to specify the description of tonnage to be paid; because, different articles being liable to different rates, you cannot tell at what rate a boat which has no articles on board, ought to be charged. But

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the answer to that is this, that then the boat will be entitled to pass on paying a tonnage of twenty tons *at the lowest rate*. In this case the charge would be 10*d.* per mile on passing any of the locks: and considering the importance of this canal to the public, and the great expenditure of water occasioned by the passage of these boats, I think that that cannot be considered as an oppressive charge. Under these circumstances it seems to me that empty boats are liable to pay every time they pass the lock the tonnage of twenty tons according to the lowest rate of duty, and that decision, according to the agreement between the parties in this case, entitles the defendants to our judgment.

ABBOTT J. The proposition that the public have a right freely to navigate this canal with their boats for all purposes, on payment of the tolls imposed, is laid down a little too generally; for the act only gives the liberty to navigate *for the purpose of carrying goods, &c. thereon*; and in 10 G. 3. s. 55. that is more clearly expressed, for it is stated that all persons are to have free leave to navigate their vessels and use them *for the purpose of carrying coals, &c. upon the canal*," which shews that for all purposes this free leave to navigate is not given. Upon the other parts of this case, I fully agree with the opinion expressed by my Brother Bayley.

HOLROYD J. concurred.

Judgment for the Defendants.

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**BUSK *against* The ROYAL EXCHANGE Assurance
Company. (a)**

Friday,
Nov. 6th.

COVENANT upon a policy of assurance, on the ship *Carolina*, at and from *Amsterdam* to *St. Petersburg*. The policy was in the usual form, and stated, amongst other risks which the defendants took upon themselves, “ fire, barratry of the master and mariners, and all other perils, losses, and misfortunes that should come to the hurt, detriment or damage of the said ship.” The declaration averred the interest to be in the plaintiff, and alleged, that during the voyage insured, the ship was consumed by fire. The defendants pleaded, that they had not broken their covenant. The cause was tried before *Abbott J.* at the *London* sittings after *Trinity* term, 1817, when the jury found a verdict for the defendants. In the ensuing term a rule was obtained, to shew cause why the verdict should not be set aside, and a new trial granted, and cause being shewn at the sittings before *Hilary* term following, the Court ordered the facts to be stated in the following case.

In an action on a policy on ship, by which, amongst other risks, the underwriters insured against fire, and barratry of the master and mariners, they are liable for a loss by fire occasioned by the negligence of the master and mariners.

Held also, that where the assured had once provided a sufficient crew, the negligent absence of all the crew at the time of the loss was no breach of the implied warranty, that the ship should be properly manned.

The policy was duly executed by the defendants, and the plaintiff was interested in the manner alleged. The *Carolina* was a *Russian* ship, and navigated by a *Russian* crew. She sailed from *Amsterdam* on the voyage insured on the 3d *October*, 1815, being then properly manned and equipped. In the course of the voyage she met with tempestuous weather, and on the

(a) This case was argued at *Serjeants' Inn*.

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25th *November* she was forced to put into *Biorkoo Sound*, a *Russian* port, at the top of the *Gulph of Finland*; here she was frozen up for the winter: it was proved to be the custom, when *Russian* ships are so frozen up, to pay off the crew, and to leave the ship in the care of the master or the mate, and to hire a fresh crew for prosecuting the voyage, at the breaking up of the ice in the ensuing spring. When ships which are not *Russian* are frozen up in *Biorkoo Sound*, a lodging is taken for the crew on shore, where they all live, except one, who continues on board to take care of the ship. The master of the *Carolina*, upon arriving in *Biorkoo Sound*, paid off his crew, left the ship in the care of the mate, and proceeded himself to *St. Petersburg*, to settle the ship's accounts, with the intention of returning to complete the voyage when the season would permit. The mate continued in charge of the ship till the 9th day of *January* following. On that day he lighted a fire in the ship's cabin, and in the evening, without leaving any body on board the *Carolina*, he went on board another *Russian* ship lying contiguous. There he remained for the night. At twelve at night he awoke, and went on the deck of the ship which he had joined; looking round he found every thing quiet, and went down again to bed. About 4 o'clock the following morning, he was alarmed by a fire which had broken out in the *Carolina*, and was then raging through the cabin windows, the round house, and on the main hatchway. In spite of all that could be done to extinguish the flames, the vessel was soon consumed to the water's edge. *The loss arose from the negligence of the mate*, in lighting a fire in the cabin, and not seeing that it was properly extinguished. It was admitted,

mitted, that the ship would have been sufficiently protected during the winter, in the care of the mate, had he done his duty.

The question for the opinion of the Court was, whether the defendants were exempted from their liability for the loss, on the ground of its having been occasioned by the negligence of the mate.

Campbell, for the plaintiff. If the assured be not entitled to recover in this case, a policy of assurance in the common form, will not afford a complete indemnity against all the risks incident to maritime adventure. The assured has performed the whole of his duty; the ship was sea-worthy and properly manned at the commencement of the voyage, and the mate, who at the time of the loss had the charge of the ship, was duly qualified for his situation. The policy therefore attached, and no blame being imputable to the assured, the underwriters are not discharged from their liability. Fire is a risk expressly insured against, and *Green v. Elmslie* (a), and *Livie v. Jansen* (b) are authorities to shew, that the proximate, and not the remote cause, is to be looked to as the efficient cause of loss; and therefore, within the rule established in those cases, the defendants are liable. But on reason and principle, they are responsible for a loss by fire, although that fire be produced by the negligence of the persons having the care of the ship, who for that purpose are to be considered as the servants of the owner; for if the proximate cause of the loss had been fire and the remote cause barratry, the underwriters would be liable, by

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(a) *Peake N. P. C.* 212.(b) *12 East*, 648.

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the express terms of the policy; and inasmuch as the assurers expressly undertake to indemnify the assured against the wilful misconduct of their servants, it must be presumed, that they intended also to indemnify them against their negligence. In the case of the insurance of a house against fire, the assurers are liable for the negligence of servants. *Austen v. Drew.* (a) And, upon principle, there seems to be no difference between that and a marine insurance, as far as this species of loss is concerned. If the negligence of the master be a ground of resisting a claim for indemnity against a loss by fire, it will be equally so in the case of a loss by capture or perils of the sea; and then it may become a nice question, whether a sufficient watch was kept, or whether a cable was taken in or an anchor let go in due time. It is a strong argument against this defence, that a loss has never been resisted on such a ground before. Our law does not afford any express authority upon this point, as far as the subject of marine insurance is concerned. The rule laid down by *Emerigon* (b), is this, that where the policy contains a clause against barratry, the assurers are liable for the negligence of the master and mariners. It is true, that the term barratry is used, in the *French* law, to express the negligent as well as the wilful misconduct of the mariners. *Straccha* and *Targa* there cited, who use the term barratry in its more limited sense, lay down the same rule, and the authority of those writers is directly in favour of the plaintiff's right to recover.

Bosanquet Serjt., contra. The assurers are not liable in this case upon two grounds. First, because the loss

(a) 4 Camp. 360.

(b) p. 434.

was occasioned by the negligence of the servant or agent, and constructively, therefore, by the negligence of the assured himself; and secondly, because at the time of the loss, the mate having absented himself, the ship was not properly manned, and therefore there was a breach of an implied warranty. Upon the first point there is no express authority in our law, but the subject is considered both by *Valin* and *Pothier*. The former in his *Treatise on the French Ordinance of Marine*, book 3. tit. 6. Des Assurances, article 27. vol. 2. p. 77., lays it down expressly, "that the assurers are not liable for losses by the fault of the master and mariners, if by the policy they are not charged with a loss by barratry;" and, in page 79. he adds, art. 28., "by the nature of the contract of assurance, the assured is not charged *of right* to answer but for losses which happen by accident or by chance of the sea; which is altogether foreign to the fault which the master and mariners may commit, and such is the *common right*." According to the opinion of *Valin*, therefore, the assurers, generally speaking, are not liable for a loss occasioned by the negligence of the master and mariners. In page 80. there is this passage: "Nevertheless, by agreement the assurers may be bound to indemnify the assured, and for this it is only necessary to charge them in the policy with barratry of the patron, energetic terms which absolutely comprehend all the damage which can result from the act of the master and his crew, whether by unskillfulness, imprudence, malice, deviation, theft, or otherwise;" and *Pothier*, in his *Treatise upon Insurance*, chap. 1. sect. 2. art. 2. § 3. p. 26., is an authority precisely to the same effect. The substance, therefore, of these authorities is, that the assurers

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are not liable for the negligence of the master and mariners, unless in express terms they insure against that risk; for the term barratry in the French law, comprehends the negligent, as well as fraudulent misconduct of the master or mariners. In our law, however, it is used in a more restricted sense, and denotes only the *criminal* misconduct of the master and mariners. By the express terms of this policy, therefore, the assurers have insured only against the fraud, and not against the negligence of the master or mariners; and therefore, upon the authority of *Valin* and *Pothier*, they are not liable for this loss. There is no analogy between marine insurance and insurance of houses against fire. Generally speaking, a servant can hardly be considered as the agent of the proprietor in the care of his house. The latter is generally present himself; but the master of a ship, on the other hand, is the uncontrouled agent of the owners for all purposes connected with the care and management of the ship, and his acts, within the scope of his authority, may be considered as the acts of the owners. But, secondly, in this case the assured has been guilty of the breach of an implied warranty; for admitting that for all necessary purposes the mate, during the detention of the ship in the ice, constituted a sufficient crew, yet at the time of the loss he was absent, and therefore the ship was not then properly manned: *Law v. Hollingsworth* (a), and *Tait v. Levi* (b), are authorities expressly in point.

Campbell, in reply. *Straccha* and *Targa*, who use the term barratry in its limited sense, hold, that the assurers

(a) 7 Term Rep. 160.

(b) 14 East, 481.

are liable for a loss by the negligence of the master and mariners. By insuring in express terms against the criminal misconduct of their servants, they must by implication be intended to have insured against the negligent misconduct of the servants. As to the second point, the owners have complied with the implied warranty by providing a competent crew at the commencement of the voyage. In *Law v. Hollingsworth* the ship at the time of the loss had not the pilot required by the act of parliament, and in *Tait v. Levi* she never had a competent captain.

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BAYLEY J. The question which the facts of this case present for the consideration of the Court is, whether the underwriters, on a policy of insurance on ship, are liable for a loss by fire, that fire having arisen from the negligence of the person who at the time of the loss had the charge of the vessel. The policy expressly throws upon the underwriters the liability for all losses proceeding from "fire, barratry of the master and mariners, and all other perils, losses, and misfortunes that should come to the hurt, detriment or damage of the ship." The object of the assured certainly was to protect himself against all the risks incident to a marine adventure. The underwriter being therefore liable *primâ facie* by the express terms of the policy, it lies upon him to discharge himself. Does he do so by shewing that the fire arose from the negligence of the master and mariners? If the ship had been wilfully set on fire, it would have been barratry, and the underwriters would be liable; but it has been argued, that the underwriters are only liable for a loss by barratry, because that is one of the risks expressly mentioned in the policy, and that the negligence of the
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master and mariners not being a risk expressly described in the policy, the underwriters are not liable for a loss thereby occasioned. In this case, however, the loss is occasioned by *fire*, against which the assured is protected by the terms of the policy; and, in our law at least, there is no authority which says that the underwriters are not liable for a loss, the proximate cause of which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master and mariners. If indeed the negligence of the master would exonerate the underwriter from responsibility in case of a loss by fire, it would also do so in cases of loss by capture or perils of the sea; and it would therefore constitute a good defence in an action upon a policy, to shew that the captain had misconducted himself in the navigation of the ship, or that he had not resisted an enemy to the utmost of his power. It is certainly a strong argument against the objection now raised for the first time, that in the great variety of cases upon marine policies, which have been the subjects of litigation in courts of justice (the facts of many of which must have presented a ground for such a defence) no such point has ever been made. There is certainly no authority in our law against the plaintiff's right to recover, and the authority of *Malynes*, p. 111. (as far as it goes), is rather the other way. (a)

The

(a) The following passage from *Malynes* was cited by the learned Judge in the course of the argument. In speaking of the risk of fire he says, "In this case let us also consider the case of the assurer; for it hath oftentimes happened, that by a candle unadvisedly used by the boys, or otherwise, before the ships were unladen, they have been set on fire and burnt to the very keel, with all the goods in them, and the assurers have paid the sums of money by them assured." And then he goes on to observe, "That in many of these cases the assurers were not

The opinions of the foreign writers, referred to in the course of the argument, are founded upon the particular language of the several policies which are the subject of their comments, and may perhaps afford a correct rule of law in the construction of those instruments used on the continent, but they are wholly inapplicable to policies used in this country, which are very differently worded. We must, however, decide this question according to the law of this country, and with reference to the specific terms used in the instrument now before us. The different opinions of foreign writers are collected by *Emerigon* (a), and it appears that *Straccha* was of opinion that the assurers were liable for fire occasioned by the fault of the mariners; but then he is speaking of the policy used at *Ancona*, by the terms of which the assured undertake for the barratry of the master. *Targa* too lays down the same doctrine, but then he is speaking of the law of *Genoa*, by which the assurers were exonerated from losses by barratry (strictly so called) although they are answerable for the fault of the mariners. *Emerigon* lays down the same doctrine, and states the law to be the same at *Hamburgh*, *Rouen*, *Nantes*, and *Bordeaux*; but, that at *Marseilles* the assurers are liable for fire when the result of accident, but not for fire occasioned by the negligence or fault of the mariners, unless, by an express clause, they make themselves liable for the *barratry* of the master; and in page 436, he refers to a case of fire,

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not liable, the cargoes having before the fire been sold while on ship-board, and then destined to some other place: but he does not intimate any doubt as to the propriety of paying the loss on the ground that the fire had been occasioned by the negligence of the mariners.

(a) *Traité des Assurances*, c. 12. s. 17. p. 434;

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occasioned by the fault of the master or mariners, where the assurers were held responsible; but in that case they had insured against *barratry*, and he states as his opinion, that unless they had so done, they would not have been liable for such a loss. The fair result, therefore, of all these authorities, is this, that the underwriters are liable for a loss by fire, occasioned by the negligence of the master and mariners, provided they insure against *barratry*, that term being, in the French writers, used in its larger sense, as comprehending negligence as well as wilful misconduct; but, inasmuch as the term *barratry* is used in our policies in a more limited sense, as applicable only to the wilful misconduct of the master or mariners, the authority of *Emerigon* affords no ground for our decision in this case. We must, therefore, endeavour to collect the meaning of the contracting parties from the terms of the policy itself, and in considering whether the assured claiming for a loss by fire, is to have that claim disallowed, on the ground that the fire was occasioned by the misconduct of the master, we must look to the other terms of the policy, and learn from them, whether the assurers, in other instances, are responsible for the misconduct of the master; and when we find that they make themselves answerable for the wilful misconduct of the master in other cases, it is not too much to say that they meant to indemnify the assured against fire, proceeding from the negligence of the master and mariners. I am therefore of opinion in this case, that the assured are entitled to recover, as for a loss by fire, although that fire was produced by the negligence of the person having the charge of the ship at the time. It has been argued,

argued, that in this case there was a breach of an implied warranty: and that there being no person on board the vessel at the time of the loss, she was not properly manned, and consequently not sea-worthy. The owner certainly is bound, in the first instance, to provide the ship with a competent crew, but he does not undertake for the conduct of that crew in the subsequent part of the voyage. It is not disputed in this case, that the assured had provided a competent crew, and that at the time of the loss, the mate himself was sufficient for all the purposes required. There was therefore a competent crew left in charge of the ship, and the implied warranty has been complied with. The cases cited with reference to this point, are quite beside the question. The case of *Law v. Hollingsworth* proceeded on the ground, that the ship at the time of the loss had not on board a pilot required by the act of parliament; and in *Tait v. Levi*, there was a breach of the implied warranty to provide a master of competent skill. I therefore think that the plaintiff, upon the facts stated in this case, was entitled to recover, and that there must be a new trial.

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ABBOTT and HOLROYD, Js. concurred.

Rule absolute for a new trial.

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Friday,
Nov. 6th.DOE, on the Demise of TOMKYNs, against
WILLAN. (a)

Devise to trustees, their heirs, executors, administrators, and assigns, in trust, to let the freehold estates for any term they thought proper, at the best improved yearly rent, to pay one-third of the rents of the freehold estates to his wife for life, and one-third of the personalty to her absolutely, and then to lay out the other two-thirds of the personalty in the funds; and to pay the dividends and the rents of two-thirds of the freehold estates, and, after the death of the wife, the other third of the rent of the freehold estate to his daughter for her own separate use, and after her death the freehold

EJECTMENT for the recovery of lands and premises in the occupation of the defendant. The demise by the lessor of the plaintiff, was laid on the 14th day of *December*, 1816. The cause was tried at the *Middlesex* sittings after *Trinity* term, 1817, before *Holroyd J.*, when the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case:

Packington Tomkyns, the great uncle of the lessor of the plaintiff, being seised in fee of the premises in question, on the 3d of *August*, 1775, by his last will duly attested to pass real estates, after appointing his wife *Elizabeth Tomkyns*, and two other persons joint executors and trustees of his will, and after bequeathing certain legacies, devised as follows: "I do hereby give and devise unto my said trustees, their heirs, executors, administrators, and assigns, all my lands, goods, chattels, and all my estates both real and personal, subject to the payment of my debts and legacies; upon trust that they do demise or let all my freehold estates, and my house wherein I now live, *for any term they shall think proper*, at the best improved yearly rent

Packington Tomkyns, the great uncle of the lessor of the plaintiff, being seised in fee of the premises in question, on the 3d of *August*, 1775, by his last will duly attested to pass real estates, after appointing his wife *Elizabeth Tomkyns*, and two other persons joint executors and trustees of his will, and after bequeathing certain legacies, devised as follows: "I do hereby give and devise unto my said trustees, their heirs, executors, administrators, and assigns, all my lands, goods, chattels, and all my estates both real and personal, subject to the payment of my debts and legacies; upon trust that they do demise or let all my freehold estates, and my house wherein I now live, *for any term they shall think proper*, at the best improved yearly rent

(a) This case was argued at *Serjeants' Inn*.

that

that can be got for the same, without taking any fine or income for the granting of such leases. And upon further trust, that they pay one-third part of all the rents and profits of my freehold estates and house unto my wife and her assigns for her life, and as to all the rest of my personal estate, to pay and dispose of one-third part as the same should be received to my wife for her own use, and as to the remaining two-third parts of my personal estate, to lay out the same in the public funds in their own names, and to pay the dividends, together with the rents and profits of two-thirds of the freehold estates, and also two-thirds of the rent of my house, and also the third part of the rents of my freehold estate and rent of my house after the decease of my wife, to my daughter *E. Longman*, and her assigns for the term of her life, for her own separate use and benefit, and not to be subject to the debts or controul of her present husband, and so that he may not have any thing to do or meddle therewith: and after the decease of my daughter, I give and devise my freehold estates, my house, and the two third parts of my personal estate to the child and children of my daughter *E. Longman*, to be equally divided amongst them, share and share alike, to be paid to them at their respective ages of twenty-one years, but in case my daughter shall die without issue, or all such issue shall die before they attain twenty-one years, then I give and devise all my freehold, and two-third parts of my personal estates to my wife for her life, and after her decease, I will that the same freehold and personal estate, shall descend and go to my own heir at law and next of kin, as the same would have done, had I died intestate and without issue.

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In *March*, 1778, *P. Tomkyns* died seised of the premises, without revoking or altering his will, leaving *E. Tomkyns*, his widow, and *E. Longman*, his only child surviving him. The widow survived her co-trustees, and died in 1796, having made a will, and thereby appointed executors, which will however was not attested so as to pass real estates. On the 12th *November*, 1816, *E. Longman* died without having had any issue. The lessor of the plaintiff was the heir at law of *P. Tomkyns*. On the 10th *November*, 1799, the executors of *Elizabeth Tomkyns*, executed a lease for twenty-one years to *H. C. Coombe*, who in 1806 assigned the same to the defendant for a valuable consideration. The question was, whether the plaintiff was entitled to recover; if so, the verdict was to stand; if not, a nonsuit was to be entered.

Richardson for the plaintiff. The lessor of the plaintiff as the heir at law of the testator, is entitled to recover. By the will, an estate is devised to trustees; but that being a trust estate, (and there being a devise over,) only continues as long as the purposes of the trust require. At the death of *E. Longman*, in the events that have happened, the necessity for the trust ceased, and therefore the estate of the trustees determined upon her death. By the will, the trustees, during the lives of the widow and daughter, were to receive the rents, to apportion them, and pay the widow her third part and the daughter her share, for her sole and separate use. Upon their death, therefore, the purposes of the trust ceased. Indeed they would cease altogether upon the death of the widow, and of the husband of the daughter; for that their estate was then
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to be determined, may be collected from the subsequent part of the will, where, after providing for his wife and daughter through the intervention of trustees, the language of the will is changed, and the estate is then left to the children of the latter, and not to trustees for their use. The trustees therefore took an estate in fee, defeasible on the death of the widow and of *E. Longman* without issue. It is true that they are enabled to make leases *for such term*, as they think proper: that is, however, subject to a restriction generally imposed on a tenant for life, viz. that they be made at the best improved rent, and that no fine be taken. Admitting, however, that under these words they might grant leases for ninety-nine years, still this clause may be construed as creating a power, and then such leases might take effect out of the power, and not out of the estate, and such a construction would be consistent with the other parts of the will. The last clause is the most important; for the testator, after providing for his wife and daughter and her children, directs that after the death of the wife and the daughter without issue, that his estate shall go to his heir at law, *as if he had died intestate and without issue*. The term heir at law is here used as *designatio personæ*, and the intention of the testator therefore was, that in those events the lessor of the plaintiff should take a fee by purchase under the will.

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Gaselee, contra. The trustees took an estate in fee; that estate vested in the widow, as the surviving trustee, and descended upon her daughter, and her heir *ex parte materna* is therefore entitled to the property.

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The term heir at law in the last clause, was not intended as a designatio personæ, for, if it were, this consequence might follow; that if *E. Longman*, the daughter, had children, who died before twenty-one, leaving children, the grandchildren would be passed over, and the estate would go to the collateral and not the lineal heir. That clearly was not the intention of the testator. All therefore that the testator meant by that clause was, that his estate should descend according to law. The trustees took an estate in fee; for all the purposes of the trust could not be satisfied by any less estate. If, for example, the widow had survived the daughter who died, leaving issue not twenty-one, the estate of the trustees must have continued to enable them to pay the shares to the widow and children; upon the death of the daughter, therefore, the trust estate would not necessarily be determined. It must at all events continue until her death; and she, upon the widow's death, took an estate in fee, and as trustee for herself, to prevent her husband's taking the profits. That estate, therefore, having come to her by descent from her mother, vests in the heir at law ex parte materna.

BAYLEY J. This is an ejectment on the demise of *John Tomkyns*, who is the heir at law of *Packington Tomkyns*, the testator, and also the heir ex parte paternâ of *Elizabeth Longman*, who was the daughter of *Packington Tomkyns*; and the plaintiff's right to recover is resisted upon this ground, that by the will of the testator, the whole legal fee vested in the trustees, of whom *Elizabeth Tomkyns* was the survivor, and that

upon her death, it descended from her to *E. Longman*, and coming to her by descent from her mother, it must descend to her maternal heir. Now the testator, by his will, devises his estates "to his trustees, their heirs, executors, administrators and assigns." Those terms are sufficiently large to carry the whole inheritance; and before we say that it does not pass, we ought to see clearly, from the other terms of the will, a definite period at which their estate must cease. He then directs "all his freehold estates, and his house in which he lived, to be demised or let for any term which they shall think proper, at the best improved yearly rent which could be got for the same." It has been argued, that this merely creates a power, and that if the trustees make a lease, it would take effect out of their power and not out of their interest. There are no words here which distinctly create a power in the trustees, and it seems to me, that when an estate is devised upon a trust, and the trustees are to demise for any term they think proper (although at the best improved rent) the true construction is, that they are to create a term out of their interest; and if so, they must have a reversion after that term entirely ceases. The trustees are then "to pay one-third part of all the rents and profits of his freehold estates, and of his house, unto his wife and her assigns, for and during the term of her life." They must therefore have the legal estate in them for the life of the wife at least. They are then "to pay the residue for the daughter's sole and separate use, for her life, not to be subject or liable to the controul of her then present husband." These latter words shew, that the testator was particularly contemplating the protection of *E. Longman*,
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against her then husband, and that probably he did not contemplate the case of her having a future husband. Then comes a limitation to her children, and it is said, that that limitation gives to them the legal estate, and that in that part of the will there is a change of language which shews, that at that period of time all the former purposes of the trust were to cease. The language there used is not so clear as to satisfy my mind, that that was necessarily the intention of the testator. That the interest (if defeasible) would continue until the death of *E. Longman*, and would not end when her first husband died, seems to me to receive some confirmation from this, that if *E. Longman* had no child by her first husband, the limitation to her children, as far as it regarded children by a future marriage, would have been a contingent remainder, and if the trustees did not take an interest co-extensive with her life, but one which might determine on the death of her first husband, that contingent remainder might have been defeated by the acts of *E. Longman* in her life-time. The estate, therefore, to the trustees, seems necessary for the purpose of protecting the interests of the children; and, inasmuch as the words "to them and their heirs" are calculated to give them the fee, I am not prepared to say that they took less than the whole legal estate, which therefore devolved upon the widow, as survivor, and upon her death descended to her daughter; and the legal estate must now be in her heir, ex parte materna. It seems to me, therefore, that this ejectment cannot be supported.

ABBOTT J. I am also of opinion, that this ejectment cannot be maintained. The testator begins by de-

devising his estate unto the trustees, their heirs, executors, administrators and assigns. These words, in their natural import, would give them the fee. If it, however, appears clearly from the whole will, that it was not his intention that they should take the fee, but some less estate, we should so construe the will that the less estate should be taken and not the fee; but if we cannot discover what less estate would satisfy the terms of the will, or the objects which the testator had in view, we are not warranted in restraining the effect of the first clause, and under that we are bound to say, that the executors took the whole fee. The first object of the testator was, that the trustees should make leases for such terms as they might think proper, with this restriction alone, that they must reserve the best improved yearly rent and take no fine. Now if these leases were to be made out of their estate, they must have the fee; and in my opinion these words are not to be considered as creating a power, but as giving an interest. The will then proceeds to make some provisions by way of trust for his daughter, who was a married woman. It is possible that he might have intended that the interest of the trustees should cease when *E. Longman* and the widow both died; but it might also have been his intention that they should take an estate beyond that period, in the event of those deaths happening before *Mrs. Longman's* children had attained twenty-one years. I am not satisfied that that was not his intention; he evidently meant that two-thirds should be reserved from the personalty till that period; for he directs, that that should be paid to, and divided among the children, on their attaining twenty-one, and
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it seems to me to follow from these words, that the trustees were to retain the principal of that money, till that period. This makes it probable that the testator meant the children to take the land at the same period; but I am by no means clearly satisfied that he actually meant to restrain the estate in the trustees to that period. Not being able, therefore, clearly to see what less estate than the fee the trustees took, or even what less estate would satisfy all the objects of this will, I feel myself bound to give effect to the testator's first words, which are free from all ambiguity, and by which the trustees took a fee. I am therefore of opinion that the legal estate must be considered as vested in the heir at law, on the part of the mother, and that the plaintiff cannot recover.

HOLROYD J. I am also of the same opinion, that the trustees under this will took an estate in fee. The estate is given to them and their heirs in trust, and amongst other trusts is one, that they should "demise all the freehold estates for any term they should think proper." This is not a power; a power is an authority to dispose of the estate, or of the interest of another person; but this is given *to them* to let for any term that *they the trustees* think proper; *they* are to receive the rent for a time at least because they are to pay part, viz. one-third, to the widow during her life. The lease therefore is to be made for rents payable *to them*, and not to another person for whom they are trustees. It appears therefore not only from the words of the will, which are words of trust, but also by the circumstance of the rents being receivable by *them*, that the leases were to operate out of the estate given to the trustees

trustees themselves. Now such leases could not be valid, unless they took an estate more than commensurate with their duration; and as by the will they have the right to grant leases for any term of years, it follows, that in order to make such leases valid, they must take an estate in fee. It cannot depend upon subsequent events, whether they are to take an estate in fee or not, because they must take that estate in the first instance, on the death of the testator. I am therefore of opinion, that in order to effectuate the intention of the testator, the trustees must have an estate in fee, inasmuch as such an estate in them is necessary for enabling them to execute the purposes of their trust.

Judgment of nonsuit.

DOE, on the Demise of COLEMAN, *against*
BRITAIN. (a)

Friday,
Nov. 6th.

EJECTMENT for certain messuages, and premises in the county of *Montgomery*. The declaration contained two counts on the demises of *I. T. Coleman*; one on the 1st *January* 1814, the other on the 1st *August*, 1816. Plea, general issue. The cause was tried before *Burrough J.* at the last *Spring* assizes for the county of *Salop*, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

A trader being seised of an estate for life, with the general power of appointment, with remainder, in default of appointment, to himself in fee; after having committed an act of bankruptcy, upon which he was afterwards declared a bankrupt, executes

his appointment in favour of an appointee: Held that all his interest having passed to the assignees by the assignment, that such appointment was void; and, therefore, that his assignees under the commission had a sufficient legal estate to maintain an ejectment.

(a) This case was argued at *Serjeants' Inn*.

William

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William Herbert being seised in fee of the premises by lease and release of the 30th and 31st *December* 1807, and by a fine levied pursuant thereto, conveyed the premises to *T. Bebb*, his heirs and assigns, to hold the same to the use of him, his heirs and assigns for ever, subject to a proviso for redemption, on payment of 1370*l.* and interest. The principal and interest remaining due, *T. Bebb* in 1809 died, and his estate in the premises vested in his son, who on repayment of principal and interest, reconveyed the same to a trustee, upon trust to hold the same to him, his heirs and assigns to the use of such persons, and for such estates and interests as *William Herbert* should appoint; and in default of such appointment to the use of *Herbert* and his assigns for his life, and after the determination of that estate, by any means in his life-time, to the use of the trustee during the life of *Herbert*, but in trust for him and his assigns; and after the determination of that estate, to the use of *Herbert*, his heirs and assigns for ever. *Herbert*, after this conveyance, continued in possession of, and carried on a considerable trade upon the premises; and on the 20th *September*, 1813, committed an act of bankruptcy, of which the defendant, on the 7th *October*, 1813, had notice. On the 15th and 16th *August*, 1814, *Herbert* executed his power of appointment in favour of the defendant. On the 30th *May*, 1816, a commission of bankrupt issued against *Herbert*, and he was afterwards duly declared a bankrupt, and the lessor of the plaintiff chosen assignee; to whom the commissioners, on the 13th *July* 1816, assigned the premises by bargain and sale, which was duly enrolled in the Court of Chancery. The question for the opinion of the Court was, whether the plaintiff was entitled

to recover ; if so, the verdict was to stand ; if not, a non-suit was to be entered.

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against
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Peake was to have argued for the plaintiff, but the Court called on the other side.

Shutt for the defendant. The bankrupt here had a mere power of appointment, which the assignees could not compel him to execute in favour of the creditors, *Thorpe v. Goodall* (a); and the bankruptcy did not deprive him of the right to execute this power, and having executed it in favour of the defendant, the latter is in by the original deed, which was executed before the bankruptcy, and therefore the legal estate is vested in him.

BAYLEY J. This case has been argued in a very intelligible manner ; but when we come to consider it, there is no difficulty whatever. The legal effect of the conveyance was to give *William Herbert* an estate for life, in case he made no appointment, and then to trustees for his life, with remainder to himself in fee. *Herbert* therefore had an estate for life defeasible in the event of his making any appointment. And if he had made a valid appointment, undoubtedly the party would have been in by the original deed ; the bankruptcy however having intervened, his power of appointment was gone ; from that period he became incapable to pass any interest whatever, all his interest having already passed to his assignees. The appointment therefore made in *August*

(a) 17 *Ves*, 388. 460.

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1814, was void in consequence of the bankruptcy which happened in *September*, 1813, and therefore the case may be considered as if there was no power of appointment in the original deed, and consequently the plaintiff in this case, as assignee of *Herbert*, has a sufficient estate to enable him to maintain this action.

ABBOTT and HOLROYD, Js. concurred.

Judgment for Plaintiff.

Friday,
Nov. 6th.

DOE, on the Demise of WELLARD and Others,
against HAWTHORN. (a)

The owner of land having, at his own expense, built a chapel, which was used for the purpose of public worship, and the congregation having subscribed a sum of money for the purpose of enlarging and improving the same, he, in

consideration that the money so subscribed should be expended for that purpose, demised the premises by lease for twenty-three years, reserving a pepper-corn rent, during his life, and 10*l.* per annum after his death. A declaration of trust was afterwards executed by some of the lessees, declaring that they would hold the premises in trust for the congregation assembling at the chapel, and that in case the public worship should be there discontinued, then that they would assign the premises for civil purposes: Held that this was a conveyance for the benefit of a charitable use, and, therefore, void within the 9 G. 2. c. 36. s. 1.

Held also, that neither the sum agreed to be expended on the premises, nor the rent reserved at the death of the lessor, could be considered a full consideration paid for the lease, so as to bring the case within the 2d section of that statute.

Held also, that the declaration of trust, although executed only by some out of the several lessees, was evidence against all of the purpose for which the lease was granted.

(a) This case was argued at *Serjeants' Inn*.

at

at *Dartford*, for the residue of a term of years, and being so possessed, he in the year 1796 erected and completed at his own expence the chapel or meeting-house in question, on a part of that land, and in the year 1806, 400*l.* was subscribed by the congregation there assembled for public worship, for enlarging and improving the same; and in consideration of the money being so subscribed, and that it should be expended for the aforesaid purposes, *Wellard* agreed to grant an underlease of the chapel for a term of years by way of security to the congregation for laying out so large a sum of money upon the premises; and accordingly a lease for twenty-three years in the common form was executed by *Wellard* to twelve persons as lessees "of all that messuage, tenement, chapel, or meeting-house, situate in *Dartford*, and which then was, and for many years past had been used as a place for the worship of Almighty God, by a society or congregation of Protestants assembling under the patronage of the trustees of the late Countess of *Huntingdon's* college," rendering a pepper-corn rent during the life of the lessor, and after his decease, a rent of 10*l.* per annum for the remainder of the term. And on the 13th day of *October*, 1806, upon the back of the said lease was indorsed a declaration of trust purporting to be by all the lessees, but which was in fact only executed by four, by which it was declared, that they would, during the remainder of the term, stand possessed of the chapel or meeting-house, upon trust, for the use and benefit of the society or congregation then assembling at the chapel or meeting-house, maintaining certain doctrines therein particularly described. But that in case the society or congregation of Protestants

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holding the doctrines aforesaid should be totally dissolved or dispersed, and the public worship at the chapel discontinued by them for the space of twelve calendar months together, then upon further trust, to assign the premises to such person, and *for such civil purposes*, as to the lessees should seem meet, or the survivors of them should unanimously agree. The chapel has always been used as a place of public worship for the congregation in the declaration of trust mentioned. The defendant *Sampson Hawthorn*, was the minister, and had possession of the chapel. On the 24th day of *March* last, *Wellard* demanded possession of the defendant, which was refused. The question for the opinion of the Court was, whether the indenture of lease of the 29th day of *September*, 1806, was void.

Chitty for the plaintiff. This lease is void within the stat. 9 G. 2. c. 36. s. 1. It is granted for the purpose of supporting a chapel for public worship, for Protestant Dissenters, and the case of *Doe v. Pitcher* (a), is an authority to shew, that such is a charitable use within the meaning of the statute. This statute has always been construed most liberally, *Attorney-General v. Graze* (b), *Durour v. Motteux* (c), *Morice v. The Bishop of Durham*. (d) It lies upon the defendant to bring himself within the proviso, which directs that that act shall not extend to the purchase of any interest in lands made for a full or valuable consideration, paid at or before the making of the conveyance or

(a) 2 Marshall, 61.

(c) 1 Ves. sen. 520.

(b) Ambler 155.

(d) 9 Ves. 406. — 10 Ves. 522.

transfer.

transfer. This cannot be considered a purchase, nor was there any consideration paid before the sealing of the lease, nor does it appear, upon the facts stated, that there ever was a full consideration, for it cannot be assumed that the rent reserved was a full consideration for these premises.

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Comyn, for the defendant. If the lease had been granted on the express condition that the premises should always be used as a meeting-house or chapel, the case of the *Attorney-General v. Graves* would be an authority to shew, that it was granted for a charitable use, within the meaning of the statute. Here, however, the lease contains a simple unconditional demise of the premises described as a chapel or meeting-house, with the usual covenants and provisoes. The lessees have the entire controul over the property, and are at liberty to convert them to any other uses they please during the term. They may, without incurring a forfeiture, convert them even into a public theatre; and if the lessees may apply the premises to any use they think fit, *Doe v. Copestake (a)*, is an authority to shew that such a case does not fall within the statute. The lease itself, independent of the declaration of trust, does not appear to be granted for any charitable use, and the latter cannot affect the lessor; for if the lessees wish to avoid the lease, they could not do so by shewing this declaration of trust, which was their own act; besides, it is executed only by four out of the several lessees, and cannot therefore affect the others. Assuming, however, that this lease would be void, within the enacting

(a) 6 East, 328.

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clause, it falls within the proviso, for it may be assumed that the 400*l.* was laid out upon the premises, and that that, together with the 10*l.* rent, reserved after the death of the lessor, was a full and valuable consideration.

BAYLEY J. The question in this case depends upon the construction of the 9 G. 2. c. 36. s. 1., which enacts, "that no man's lands, &c. shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or anyways conveyed or settled to or upon any person or persons, bodies politic or corporate, for any estate or interest whatsoever, in trust or for the benefit of any charitable uses whatsoever, unless such conveyance be made by deed, sealed and delivered, in the presence of two or more credible witnesses, twelve months before the death of the donor or grantor, and be enrolled in the Court of Chancery, within six calendar months after the execution thereof." It is admitted, that if this lease come within the former part of the clause, it is void, inasmuch as the provisions of the act have not been complied with, and the question therefore is, whether it was conveyed for the benefit of a charitable use. Now, to ascertain the purpose for which the lease was made, we must see, first, the situation of the parties at the time; then, what was the thing granted; and lastly, the declaration of the lessees to whom the grant was made. It appears, from the case, that in 1796, *Wellard* had, at his own expence, erected a chapel, and that 400*l.* had been subscribed for the making of improvements by the congregation, and that the lease was executed as a security to the congregation, for laying out so large

a sum of money upon the premises. The motives, therefore, which induced *Wellard* to grant the lease were, that the chapel might be enlarged and improved as a place of public worship; and he agreed, that the congregation should have the lease, as a security for the money they were about to lay out on the premises, which were to continue to be used as a place for public worship. The lease itself then describes the subject matter of the conveyance as a chapel or meeting-house, which then was and had been used as a place of public worship, and there is then a reservation of a peppercorn rent during the life of the lessor, and upon his death, 10*l.* per annum during the remainder of the term. It has been argued, that this must be taken to be a full consideration for the granting of the lease, and that this case, therefore, comes within the exception of the act of parliament. When the plaintiff has, however, once established that this is a charitable use, it lies upon the defendant to bring himself within the exception; but it is quite impossible to say, that this was a full and valuable consideration. *Wellard* had, at his own expence, built this chapel upon his own land, and 400*l.* having been subscribed for the improvement of that chapel, he parts with the premises for twenty-three years, without receiving any remuneration whatever, in the event of his living to the end of the term, and if he die, then his executors are to receive 10*l.* per annum during the residue of the term. The purposes, therefore, for which the lease was to be made, is stated on the case, and if that only had been stated, without adding the declaration of trust, I should have thought that this case came within the act of parliament. I take it to be quite clear, that it is not necessary that the pur-

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pose should appear upon the face of the instrument itself, for if it were so, the statute might always be evaded. Then, if we look to the declaration of trust, it puts the matter beyond all doubt, for the purposes for which the lease was granted are there specifically described, and clearly amount to a charitable use; and although the premises may cease to be used for public worship, yet the lease having been originally granted for a charitable use, is void. It has been argued, too, that the declaration of trust having been executed by four only out of the several lessees, is only evidence against those; but I take it to be clear, that the declaration of one of the lessees is evidence against all as to the purpose for which the lease was taken. Under these circumstances, I have no doubt, that this lease is void, within the 9 G. 2. c. 36. s. 1.; and that being so, there must be judgment for the plaintiff.

ABBOTT J. If the Court were to hold this lease good they would establish a precedent by which the provisions of the 23 H. 8. c. 10. and the 9 G. 2. c. 36. would be rendered nugatory. The lease does not in itself contain any declaration of the use or purpose for which it is granted. I take it to be quite clear, however, that in order to learn that purpose the Court may look not only at the instrument itself, but at the accompanying facts both before, at, and after the execution of the lease. The intention of the grantor is to be inferred from his acts. Looking at the facts before the execution of the lease, we find that the chapel was erected by the lessor for the use of a congregation of a particular description, that that congregation had subscribed

scribed a sum of money with a view of improving the chapel, and that it was agreed that they should hold the same for the purpose of carrying on a certain species of religious worship for the period mentioned. This took place before the declaration of trust was indorsed on the back of the lease. In furtherance of the object of that instrument, the indorsement was prepared, which was intended to be executed by all the lessees, and which states that the lease was granted in order that the premises might be used by the whole of the congregation as a place for the celebration of divine worship. We have therefore one piece of evidence which cannot deceive us as to the use which was the object of this lease, and it is clearly either a superstitious use within the stat. 23 H. 8. c. 10., or a charitable use within the 9 G. 2. c. 36.; and if it falls within the provisions of either of these statutes, the lease is void. And it does not come within the exception in 9 G. 2. c. 36., for no money was actually paid to the lessor as a consideration for granting the lease. Upon the whole, therefore, I am of opinion that this lease is void, and that the lessor of the plaintiff is entitled to recover.

HOLROYD J. I am also of opinion that this lease is void. It is a general principle of law, with respect to deeds, that where a statute makes them void as for charitable or superstitious uses, or where they are void by the common law as contra bonos mores, that the proof of their invalidity may be collected, not only from the instrument itself, but from circumstances which, though they do not appear upon the face of the deed, may be taken into consideration. Then what are the facts of this case? It is stated that 400*l.* had been subscribed

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by the congregation, for the purpose of enlarging and improving the chapel for public worship. I take that to mean an enlargement and improvement for their more conveniently witnessing the performance of public worship there. Then it is further stated as a consideration for the grant of the lease, that this money was to be expended *for the purposes aforesaid*; that is, for the enlarging and improving the chapel for public worship. If so, the 400*l.* was not a valuable consideration paid to the landlord for granting the use of his premises but was money laid out for the purpose of enlarging the building for public worship, which was for the convenience of the congregation themselves, without any reference whatever to the interest of the landlord. Then if the lease were made by him for that purpose, it is clearly a charitable use within the 9 G. 2. c. 36. s. 1. As we are not bound, however, to confine ourselves to the instrument itself, and may even look to independent circumstances to learn the object of the lessor, we may have recourse to the declaration of trust, and that contains the acknowledgment of four out of the several lessees, that the lease was granted for a purpose which in point of law is a charitable use. Upon these grounds, I am of opinion that the lease is void.

Judgment for the Plaintiff.

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TWYNAM *against* PICKARD the Younger. (a)Friday,
Nov. 6th.

COVENANT. Declaration stated, that one *H. N. Middleton* being seised in fee of the premises, demised the same by lease to the defendant for fourteen years, and that the defendant covenanted to repair, &c. The declaration then stated the entry of the defendant upon the premises, the reversion still remaining in *Middleton*; that the latter by lease and release conveyed his reversion to *W. H.* and *W. T.* in fee; that they became seised of the reversion in fee, and that they on the 15th day of *February*, 1810, by lease and release, conveyed to the plaintiff the reversion of *part of the said demised premises*, whereby he became seised of the reversion of *that part of the premises in fee*. The declaration then alleged breaches of covenant for not repairing that part of the premises, the reversion of which had been conveyed to plaintiff. General demurrer and joinder.

Covenant will lie by the assignee of the reversion of *part of the demised premises*, against the lessee for not repairing.

Selwyn, in support of the demurrer, stated the questions to be, first, whether an action of covenant could be maintained at common law by the assignee in fee of the reversion of part of the demised premises, for breaches of covenant contained in the original indenture of demise, such breaches relating to that part of the premises, the reversion whereof had been conveyed to the assignee: and if not, then, secondly, whether such an action be maintainable under the stat. 32 *H. 8. c. 34*. As to

(a) This case was argued at *Serjeants' Inn*.

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the first question, it appears by the preamble of the statute of the 32 *H. 8.*, that an action of covenant by an assignee of the reversion of the whole of the premises, did not lie at common law. And *Barker v. Damer* (a), *Thrale v. Cornwall* (b), and *Thursby v. Plant* (c), are authorities to shew that such an action was not maintainable. But, secondly, an action of covenant cannot be maintained by an assignee of the reversion of part of the demised premises under the statute of 32 *H. 8.* In *Bac. Abr. tit. Covenant*, (E. 6.) it is laid down, that the statute of 32 *H. 8.* does not extend to grantees of the reversion in part of the land. And in *Harg. Co. Litt. 215. b. note 118.*, the distinction is taken between the grantee of part of the reversion in the whole, and the grantee of the whole estate in reversion in part. In the former case, the grantee is an assignee within the statute, and may take advantage of a condition, but in the latter he is not. That a grantee of part of the reversion in fee, as for instance a grantee of the reversion for years, is within the statute, is clear from the case of *Attoe v. Hemmings* (d), but then he must be a grantee of the whole estate demised. And the words, "or any parcel thereof," mentioned in the second section of the statute of 32 *H. 8.*, refer to the assignees of "farmers, lessees, and grantees of lordships, &c.," and cannot be held to extend to the assignees of lessors or grantors. It is true that Lord Chief Baron *Comyns*, in his *Digest*, (tit. *Covenant*, (B. 3.) lays it down, that covenant lies by an assignee of part of the estate demised. But it appears

(a) 3 *Mod.* 338.(b) 1 *Wils.* 165.(c) 1 *Saund.* 240. n. 3.(d) 2 *Bulst.* 281.

that he considered the point doubtful, for when he cites his authority for the position he prefixes to it a "semble;" and on referring to his authority, which is *Sherwood and Nonnes'* case (a), the question which was there raised was whether an assignee of parcel of the reversion could maintain covenant, and that question was adjourned. And in an anonymous case (b), where a warren in fee extending into three towns was leased by deed rendering rent, and the lessor afterwards granted the reversion of the warren in one of the towns, and the lessee attorned, it was held that as the original contract could not be apportioned, neither the grantor nor the grantee should have any part of the rent during the term.

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Moore, contra. As to the first question, the preamble of the statute certainly shews, that this action was not maintainable at common law. But, secondly, the statute confers this remedy upon the assignee of the reversion, although he be assignee only of *part* of the demised premises. That statute gives to the assignee the same remedy that the lessor would have had; and as the lessor in this case might have sued upon the covenant, so may his assignee. And such a construction of the statute is favourable to alienation. There is no express decision in point, but the words of the statute being general, it is open to the Court to give that construction which may best effectuate the general object. The second section of the statute provides, "that the lessee or his assignee should have a remedy by action of covenant, against the assignee of the reversion of part," yet it is contended, that the

(a) 1 *Leon.* 250.(b) 3 *Leon.* 1.

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latter has no reciprocal remedy; and, consequently, if the original lessee had covenanted to repair, the assignee of the reversion of part would have been deprived of all remedy upon the covenant. In *Kitchen and Knight v. Buckley* (a), where the lessor had granted one half of the reversion to *Kitchen*, and the other half to *Knight*, who joined in an action of covenant against the lessee for not repairing, it was moved in arrest of judgment, that being tenants in common they could not join in an action, but the Court adjudged that they might, as the action was merely personal. Now that question could not have arisen, if the assignee of the reversion of part could not sue *at all* or *alone*; for if the remedy is once suspended it is extinguished for ever. The question then occurs, is a covenant divisible? That a covenant is divisible as far as regards the covenantor is clear from the case of *Congham v. King* (b), which case was cited and approved of by Lord *Ellenborough*, in that of *Stevenson v. Lambard*. (c) Then if a covenant is divisible as to the covenantor, a fortiori, it is so as to the covenantee. As to the case of a condition, no inference by way of analogy can be drawn from it, because a condition being in the nature of a penalty or forfeiture cannot be apportioned or divided, *Co. Litt.* 215. a., *Dyer.* 309. a.

Selwyn, in reply. By the assignment of the reversion, the privity of contract is destroyed. *Bord v. Cudmore*. (d) The legislature has used different language in the first and second sections of the statute. The first

(a) 1 *Lev.* 109.(b) *Cro. Car.* 222.(c) 2 *East*, 580.(d) *Cro. Car.* 183.

section is confined to the assignees of the reversion of the whole, but the second section applies to assignees of the reversion of a part of the estate. In *Kitchen v. Buckley*, this question was not raised. If the construction contended for by the other side should be put upon this statute, the lessor may subject his lessee to a multiplicity of actions against his consent, for the lessee will be subjected to as many actions as the lessor may choose to divide the reversion into parts.

BAYLEY J. Although it has never been expressly decided, that the assignee of the reversion of part of the demised premises can maintain this action against the lessee, yet, when the question comes fairly to be considered, I cannot entertain any doubt that covenant will lie both by and against the assignee of the reversion of part of the premises. The 32 H. 8. c. 34. s. 1., enacts, "that the grantees or assignees of any reversion or reversions, shall have the like advantages against the lessees by entry for non-payment of the rent, or for doing of waste or other forfeiture, and also shall have all such like and the same advantage, benefit, and remedies, by action only, for not performing of other conditions, covenants, or agreements contained and expressed in their leases, demises, or grants against the lessees, as the lessors or grantors themselves might have had at any time." The words therefore apply to conditions as well as to covenants, and are sufficiently large to include persons who are grantees of the reversion, either of the whole or part of the property, which is the subject of the lease. That part, however, which applies to conditions which in their very nature are entire, is necessarily confined to the assignees of the
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reversion of the whole of the premises. The authorities cited in the course of the argument, to shew that the assignees of the reversion of part are not within the act, were cases of conditions, and do not apply to covenants. I do not agree to the distinction taken in the argument, between the first and second sections of the act, for the words used in both sections are substantially the same, and must receive the same construction. The only difference is, that the words in the first section apply to the assignee of the reversion; those in the second section, to the assignee of the term. Then, except in cases where the construction of the statute is confined by the use of the word condition, and the nature of the thing, there is no good reason why the word assignee in the statute should not be held to extend to the assignee of the reversion in part, as well as of the whole of the premises. In *Palmer v. Edwards* (a), it was held, that the assignee of part of the premises from the lessee might maintain covenant against the lessor; and there *Buller J.* considered the remedies as mutual. In *Congham v. King*, it was held, that the lessor might maintain covenant against the assignee of part of the premises demised. These authorities seem to shew, that the severance of the estate demised does not take away the mutual remedies. I have always understood it to be clear law, that covenant was maintainable by the assignee of the reversion in part. In *Kitchen v. Buckley*, this objection, if valid, would have succeeded; and it can hardly be supposed, that if it had been considered valid, it would have been overlooked. In *Pyot v. Lady St. John* (b), a person seised in fee of one

(a) 1 *Dougl.* 187.(b) *Cro. Jac.* 329.

messuage, and possessed of a term of years in other premises, demised both for ten years to Lady *St. John*, by one lease, and then, by separate deeds, conveyed the reversion in fee, and the reversion for years to *Pyot*. On an action of covenant being brought, it was objected, that *Pyot* ought to have brought several actions, but no objection was taken, that he was possessed, by each separate deed, only of the reversion of part of the premises. The Court held, that though he might have brought several actions, still the bringing only one action was well enough. But if this objection had been valid, that decision could not have taken place; because it would have been an obvious answer to say, that several actions would not lie, inasmuch as in each it must have appeared that *Pyot* was only assignee of the reversion in part. Upon authority, therefore, as well as principle, I am of opinion, that this action is maintainable; and, therefore, that there must be judgment for the plaintiff.

ABBOTT J. I am of the same opinion. The statute makes no material distinction between the assignee of the reversion and the assignee of the term. It has been decided, that the assignee of part of the premises for the term may maintain this action, and it therefore appears to me to follow that the assignee of the reversion of part may do the same.

HOLROYD J. I am also of opinion that this action is maintainable. The cases cited in argument apply only to conditions, with respect to which the statute expressly enacts, "that assignees shall have the like advantages

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vantages against the lessees by entry for non-payment of rent, or for doing of waste or other forfeiture, as the lessors would have had." Now if the lessor assigned the reversion of part of the premises to another, his right of entry would be gone, for in *Knight's* case (a), it was expressly held, that the severance of any part of the reversion destroyed the whole condition (which was entire, and the breach of which gave one entire right of entry into the whole premises on non-payment of rent;) that being so, the lessor at common law would have no right, in such a case, to vacate the lease by entry, and consequently his assignee would not have that right under the statute. But that does not apply to the case of covenants, for three, although the lessor has granted away part of the demised premises, still at common law he might maintain covenant against the lessee, and therefore it seems to me, that his assignee of part of the demised premises is entitled under the statute to maintain that action.

Judgment for Plaintiff. (b)

(a) 5 Coke, 55. b.

(b) In *Shepherd's Touchstone*, 176., the following is stated, among the covenants of which grantees shall take advantage by the stat. H. 8. : "As where a lessee for life or years doth covenant with his heirs to keep the houses demised in good reparation, or the like, and after the lessor doth grant away the reversion of all, or part of the houses to J. S., in this case J. S. shall take advantage for any breach of the covenant in his time, but not for any breach before the time the reversion was granted." And *Pime's* case, Mich. 8 Jac. is cited.

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REES *against* WARWICK.Saturday,
Nov. 7th.

ASSUMPSIT, by the indorsee of a bill of exchange against the acceptor. The bill was drawn by *Dennison, Benson, and Co.* upon the defendant, payable two months after date to the order of *Johnson and Co.*, and by the latter indorsed over to the plaintiff. Plea, general issue.

At the trial at the last *Lancaster* assizes before *Bayley J.*, it appeared, that on the 4th of *May*, the day after the bill was drawn, the drawers wrote the following letter to the defendant. "Yesterday we valued upon you, favour *W. Johnson and Co.* two months for 100*l.* which please to honour." In reply to which the defendant wrote word "your bill 100*l.* to *W. Johnson and Co.* shall have attention." Before the last letter had arrived the bill had been in the possession of *Johnson and Co.*; but the letter was afterwards communicated to them, and by them to the plaintiff previously to the bill being indorsed over to him. The learned Judge, at the trial held, first, that in order to make this an acceptance the letter ought to have been written to the payee; and not to the drawer of the bill; and, secondly, that the phrase "shall have attention," did not amount to an acceptance, but left it still open to the defendant to refuse to accept the bill. On its being suggested that in the dealings between these parties, these particular words had meant the acceptance of the bill to which they were applied, he permitted other letters written by the defendant to the drawee, concerning other bills which had been paid by him, to be given in evidence, in order to

Where the drawer of a bill wrote to the drawee, stating that he had valued on him for the amount, and added, "which please to honour;" to which the drawee answered, "the bill shall have attention:" Held that these words were ambiguous, and did not amount to an acceptance of the bill, inasmuch as although an acceptance may be made by a letter to a drawer, still that can only be so where the terms of the letter do not admit of doubt,

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prove that fact. But it appeared that in those letters different expressions had been used, and the jury were of opinion that the words "shall have attention" had not, as between these parties, clearly and unequivocally signified the acceptance of a bill. The learned Judge thereupon directed a nonsuit, with leave to move to enter a verdict for the plaintiff, in case the Court should be of a different opinion. And now

Richardson moved accordingly. It is clear that a bill of exchange may be accepted by a letter written to the drawer, and that too, after he has parted with the bill. That appears from the cases of *Powell v. Monnier* (a), and *Wynne v. Raikes* (b). Then if so, the only remaining question in this case will be, whether the letter of the defendant amounted to an acceptance of the bill. There is no particular form of words necessary for this purpose. It appeared on the trial, that other letters, respecting other bills, had been written by the defendant, in some of which he had said that the bills "should have attention," in others that they "should meet protection;" and all these bills had been paid. Now, with respect to the present bill, the case stands thus. The drawers wrote word to the defendant that they had drawn a bill upon him, and added, "which please to honour." And his answer to it was, that the bill "should have attention." The fair import, therefore, of that is, that it amounts to a promise on his part, that the bill when presented to him should be honoured. And that would be an acceptance of the bill by him.

(a) 1 Atk. 611.

(b) 5 East, 514.

ABBOTT C. J. I have no desire to break in on the authority of the two cases which have been cited; but I think, that if a letter written to the drawer of a bill of exchange, after he has parted with it, is to be holden to amount to an acceptance of the bill, that letter ought to be in terms which do not admit of any doubt. In both the cases referred to, there was no doubt; for in *Powell v. Monnier*, the letter stated, "that the bill should be duly honoured." And in *Wynne v. Raikes*, "that the defendants would accept or certainly pay the bill." But here the defendant, in his letter, says "your bill for 100*l.*, in favour of *W. Johnson* and Co., shall have attention." The phrase "shall have attention," is at least ambiguous; it may mean, that the defendant would examine and enquire into the state of the accounts between them, for the purpose of ascertaining whether he would accept the bill or not. If, indeed, it could have been shewn, that these words, either generally in the mercantile world, or as between these individual parties, meant an acceptance of the bill to which they related, the case would have been different. But that has not been done. It is true, indeed, that several letters were produced at the trial for that purpose, but in those letters, the forms of expression used by the defendant varied. At all events, the utmost that could be done, would be to leave those letters (as they were left) to the jury, for them to draw the conclusion as to the meaning of the words used; and it appears that the jury thought that the meaning of the words "shall have attention," was by no means clearly and unequivocally an acceptance of the bill. Unless that is the clear and unequivocal meaning of those words, the plaintiff, in my opinion, is not entitled to recover.

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HOLROYD J. I am of the same opinion. The very circumstance, that it has been so often lamented that any thing short of a written acceptance on the face of the bill should be held to make a party liable as acceptor, shews the inconvenience that arises from the great uncertainty which is thereby introduced. In this case the words contended to be an acceptance are, that the bill "shall meet attention." The defendant does not say, as in *Wynne v. Raikes*, that the bill "shall be paid or accepted;" but in fact only that he will attend to it. Consistently then with these words it might depend on the state of the account between them, whether he would accept the bill or not. And it does not appear from the other letters which were produced, that the defendant used these particular words as denoting the acceptance of a bill; for he uses different phrases in the different letters. I think, therefore, that this rule ought to be refused.

BAYLEY J. (who tried the cause,) concurred.

Rule refused.

STOVELD *against* BREWIN and Another.

Saturday,
Nov. 7th.

Payment of money into court generally on the whole declaration admits the contract as stated in each count, and a breach of it, and that something is due on each count thereon; but it does not admit the amount of the breach there stated.

THE declaration stated the contract between the parties to be, "that the plaintiff had sold to the defendants, a large quantity of oak-bark, to be delivered in his yard at *Bermondsey*, at the average price at which the plaintiff had sold or might sell to the

tanners

tanners in *London* that season, and which price was to be ascertained by the 10th *October*, the payment to be as last year." It then contained the following averment, "that afterwards and before the 10th day of *October* then next, the average price at which the said plaintiff then sold the said oak-bark to the said other tanners in *London*, was theretofore, to wit, on the 10th day of *October* then next, ascertained, and that such average price amounted to a certain large sum of money, to wit, the sum of 31*l.* 10*s.* for each load." The defendants paid money into court generally upon the whole declaration. At the trial at the last *Sussex* assizes, before *Abbott C. J.* the only question between the parties was as to the amount of the average price per load of the oak-bark. *Courthope* for the plaintiffs, contended, that the payment of money into court generally was an admission of every averment in the declaration necessary to support the plaintiff's case; amongst which was the averment that the average price was 31*l.* 10*s.*, but the learned Judge thought, that notwithstanding the payment of money into Court, it was still open to the defendants to contend, that the amount of the average was not so much as that stated in the declaration. The jury found for the defendants, and now

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Courthope moved for a new trial upon this ground, and recapitulated his former arguments, and he cited *Cox v. Brain* (a), *Yate v. Willan* (b), and *Mellish v. Allnut* (c); but

(a) 3 *Taunt.* 97.(b) 2 *East*, 128.(c) 2 *M. & S.* 111.

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The Court held, that the payment of money into court generally on the whole declaration, admitted only a cause of action on each count and a breach, and something due thereon, but not the amount of the breach there stated; for the defendant, when he pays the money into Court, expressly contends, that the breach does not extend beyond the sum so paid in. Here the defendants have admitted, that an average was struck, but not the amount of that average. The case of *Cox v. Brain* is very different from this, for in that case there was a specific bargain to pay a particular sum, and the payment of part of the money into Court, which admitted the bargain, admitted the sum also, which was originally due; and the only question that could be raised after that admission would be, whether the remainder of the money had been previously paid or not. And *Holroyd J.* added, that in the case of a contract for the payment of a certain quantity of foreign money, where the declaration contains an averment of its value in *English* money, there even after judgment by default, it is still necessary to prove the value. So also after judgment by default in an action for the treble value of tythes, the value is not thereby admitted, although it is stated in the declaration. And the payment of money into Court, must be governed by the same principles.

Rule refused.

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THOMAS *against* COOK.Monday,
Nov. 9th.

ACTION for use and occupation. At the trial of this cause at the *London* sittings after *Trinity* term before *Abbott J.*, it appeared that the plaintiff had originally let the premises, consisting of a house in *Long-lane* to the defendant as tenant from year to year. After he had resided there for some time, the defendant underlet them to one *Perkes*, commencing at *Christmas* 1816. At *Lady-day* 1817, defendant distrained *Perkes's* goods for rent in arrear. Rent being then due from the defendant to *Thomas*, the latter gave notice to *Perkes* not to pay the rent to the defendant, but to him; and upon *Cook's* refusing to take *Perkes's* bill for the amount then due, the plaintiff agreed to take it himself in payment of the rent due from *Cook* to him, saying that he would not have any thing further to do with *Cook*. And afterwards, in *October* 1817, the plaintiff himself distrained the goods of *Perkes* for rent in arrear. The jury found, by the direction of the learned Judge, a verdict for the defendant, on the ground that *Thomas* had, with the assent of *Cook*, accepted *Perkes* as his tenant of the premises. And now

A. being tenant from year to year, underlet the premises to *B.*, and the original landlord, with the assent of *A.*, accepted *B.* as his tenant, but there was no surrender in writing of *A.'s* interest; rent being subsequently in arrear, the landlord distrained on *B.'s* goods: Held that these circumstances constituted a valid surrender of *A.'s* interest by act and operation of law within the 29 Car. 2. c. 3. s. 3.

Topping moved for a new trial. By the third section of the statute of frauds, "no lease or term of years or any uncertain interest of or in any messuages, lands, tenements, or hereditaments, shall be surrendered unless by deed or note in writing." Now the utmost that appeared on the trial was a parol surrender by *Cook* of his

1818.

 THOMAS
 against
 COOK.

interest in the premises, and in *Mollett v. Brayne* (a), it was held by Lord *Ellenborough* that a tenancy from year to year could not be determined by a parol license from the landlord to the tenant to quit, and the tenant's quitting accordingly. The same point was ruled in *Doe v. Ridout* (b). Then if this surrender be void the case falls within the authority of *Bull v. Sibbs* (c), and the plaintiff is entitled to a verdict.

ABBOTT C. J. By the third section of the statute of frauds, it is enacted "that no leases, estates, or interests, either of freehold, terms of years, or any other uncertain interest in any messuages, manors, lands, tenements or hereditaments shall be surrendered, unless by deed or note in writing, or by act and operation of law." And the question in this case is, whether what has been done will amount to a surrender by act and operation of law. Now the facts of the case are these. The plaintiff *Thomas* had let the premises in question to the defendant as tenant from year to year, and the defendant underlet them to *Perkes*. The rent being in arrear, the defendant, on *Lady-day* 1817, distrained the goods of *Perkes*, who having tendered a bill in payment of the rent which the defendant had refused to receive, the plaintiff then interposed, took the bill in payment, and accepted *Perkes* as his tenant: and afterwards in *October* 1817, himself distrained the goods of *Perkes* for rent then in arrear. I left it to the jury to say whether under these circumstances the plaintiff had not, with the assent of *Cook*, accepted *Perkes* as his tenant of the premises, and the jury found that fact in the af-

(a) 2 *Campb.* 105.(b) 5 *Taunt.* 519.(c) 8 *Term Rep.* 327.

firmative.

firmative. I think, therefore, this amounted to a valid surrender of *Cook's* interest in the premises, being a surrender by act and operation of law. The consequence is that the plaintiff can have no claim for rent against the present defendant, and that the verdict therefore was right.

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 THOMAS
against
Cook.

BAYLEY J. If a lessee assigns over his interest, and the lessor accepts the assignee as his tenant, the privity of estate is thereby destroyed, and on that ground it is not competent for the lessor to bring debt against the lessee. Where, indeed, the contract is by deed, there he may bring covenant by the statute of *H. 8.* In this case, the landlord has accepted *Perkes* as his tenant, and must be considered to have made his election between *Perkes* and *Cook*. And the case of *Phipps v. Sculthorpe (a)*, is an authority to shew that the plaintiff has no right to recover. This was a surrender of *Cook's* interest in the premises by act and operation of law, and the jury were quite right in presuming that *Cook* had assented to the acceptance of *Perkes* as tenant to the plaintiff; for that assent was clearly for *Cook's* benefit.

HOLROYD J. It appears from the statute of frauds, that a surrender in order to be valid, must be either by deed or note in writing or by act and operation of law. In *Mollett v. Brayne (b)*, there was only a parol surrender, and no circumstance existed in that case which could constitute a surrender by act and operation of law. But in this case, there is not merely a

(a) 1 Barn. & Ald. 50.

(b) 2 Campb. 103.

declar-

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 THOMAS
 against
 Cook.

declaration by the plaintiff, that he will no longer consider *Cook* as his tenant, but there is also the acceptance by him of another person as the tenant, and that acceptance is assented to by *Cook*. Now, if a lease be granted to an individual, and there be a subsequent demise of the premises by parol to the same person, that will amount to a surrender of his lease. Then the circumstances of *Cook* having first put in another person as undertenant, and having afterwards assented to a second demise by the plaintiff to that person, will in the present case amount to a virtual surrender of his interest by act and operation of law. Notwithstanding therefore the third section of the statute of frauds, I am of opinion, that the facts here found by the jury amount to a valid surrender of *Cook's* interest, and a re-demise of the premises by the plaintiff to *Perkes*. In that case there will be no ground for disturbing the present verdict.

Rule refused.

 Monday,
 Nov. 9th.

DOE, on the Demise of WILLMETT and Wife,
 against ALCHIN and Another.

Where by a settlement in contemplation of marriage the estates were given to trustees, for the use of such of the children, child, and issue of the body of the settlor by his intended wife, and in such shares, &c. as he and his wife, or the survivor of them, should by deed or will appoint: Held that an appointment of the whole estate to one of the children by the widow was valid; and that the words "such shares, &c." did not import that it was necessarily to be divided, and some part appointed to each child.

EJECTMENT against the defendants, to recover possession of a certain estate called *Cage-farm* at *Hadlow* in the county of *Kent*. At the trial of the cause before *Abbott J.* at the last assizes for the county of *Kent*, it appeared that *George Alchin* being seised

of

of this estate, executed a settlement in contemplation of marriage by which he conveyed his estate to trustees, in trust (after other limitations) “for the use of such of the children or child and issue of the body, of the said *George Alchin*, on the body of the said *Frances* his intended wife, to be begotten as well male as female, and in such shares, parts, and proportions, and for such estate or estates, and such provisoes, conditions, and limitations, and in such manner as the said *George Alchin* and *Frances* his intended wife, or the survivor of them by deed or will, should direct, limit, or appoint.” The intended marriage took effect, and the issue of it were two daughters, *Harriet* and *Frances*; of whom the former married *Willmett*, one of the lessors of the plaintiff, and the latter was one of the defendants in the suit. The widow, having survived her husband *George Alchin*, made by deed an appointment of the whole of the *Cage* estate, to the defendant *Frances Alchin* in fee. Under these circumstances, the jury by the direction of the learned Judge, found a verdict for the defendants: and now

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DOE
against
ALCHIN

Espinasse, moved for a rule to shew cause why the verdict should not be entered up for the lessors of the plaintiff as to a moiety of the estate. The appointment in this case by the widow was not valid, for she could not by law appoint the whole estate to one of the daughters; the case of an appointment to children stands upon peculiar grounds, and it was so stated by Lord Mansfield in *Spring dem. Titcher v. Biles* (a), and

(a) 1 Term Rep. 435. n. f.

there,

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 Dox
 against
 ALCHIN.

there, though the appointment of the whole estate to one of the testator's relations was held valid, yet it was considered that the case would have been different if it had been an appointment to children, as the present case is: and in *Swift v. Gregson* (a), the words of the power were "for the use and behoof of such child and children as J. G. should appoint;" but that case is distinguishable from the present, for there are additional words here, viz. in such shares, parts, and proportions, &c. so that it appears that the testator clearly intended the estate to be divided into parts; if so, then this appointment is bad, and the lessors of the plaintiff are entitled to a moiety of this estate.

ABBOTT C. J. I am not able to distinguish this case from *Swift v. Gregson*, and *Liefe v. Saltingstone*. (b) A distinction has indeed been attempted to be made between those cases and the present, depending on the words, shares, parts, and proportions which exist in the present settlement. But I think that distinction not available; for those words can have an effect only where the person who is to execute the power of appointment, thinks proper to divide the estate into parts, but they do not compel her so to do. This case goes no further than those where a power is given to appoint in favour of such of the children or child as the trustees might please, and the Courts have always held, that those words gave the trustee a power to appoint exclusively to one child only. Besides, here there are not the words "to and amongst such children," which might make a difference. I think therefore, that the non-suit was right.

(a) 1 Term Rep. 455.

(b) 1 Mod. 189.

BAYLEY

BAYLEY J. The words, "to and amongst," have a strict technical sense, and where those words are used, each child must have some share assigned to him. But where the words are as here, for the use of such children or child as *A. B.* may appoint, there the trustee may select one as the sole object of his bounty, and is not bound to give some portion to each. The argument for the plaintiff proceeds upon an omission of the word "such." If that word were omitted it might follow that each child must have a share: but the insertion of the word "such" imports an intention on the part of the settlor to give the power of selection.

HOLROYD J. I am of the same opinion, that the appointment in this case to one child is a good appointment. The words here are not "to and amongst," but "to such children or child as the widow should appoint." If therefore she chose to give shares to more than one, she might apportion them as she pleased. But I think that an appointment to one would be equally within the power, and that this case must be governed by that of *Swift v. Gregson*.

Rule refused.

1818.

—
Doe
against
ALCHIN.

1818.

Tuesday,
Nov. 10th.

DOE, on the Demise of LITTLEDALE, *against*
SMEDDLE and Others.

Where a marriage-settlement conveyed an estate to trustees for the use of settlor for life, then to the use of his wife for life, and then for the use of his first son and the heirs of such first son, and from and immediately after the determination of that estate for the use of his second, third, and all and every other son and sons, and their several and respective heirs; and for default of such issue, then to the use of all and every his daughter and daughters, and their heirs, to take as tenants in common, and not as joint-tenants; and for want of such issue, then for the right heirs of the survivor of himself and his wife for ever: Held that under these limitations the sons took successively estates tail, and the daughters an estate in fee.

EJECTMENT, for certain premises situate in the parishes of *Saint Bees* and *Saint Bridget*, in the county of *Cumberland*, occupied by the defendants. At the trial at the last *Cumberland* assizes, before *Bayley J.*, it appeared, that in the year 1776, *Henry Littledale*, being seised of the premises in question, in contemplation of marriage, made a settlement, by which he conveyed the premises to trustees, "in trust for the use of himself for life, then to the use of his wife for life, and then in trust for the use of his first son, and the heirs of such first son, *and from and immediately after the determination of that estate*, in trust for the use of his second, third, fourth, fifth, and all and every other son and sons, and their several and respective heirs, *and for default of such issue*, then to the use of all and every of his daughter and daughters, and their heirs, to take as tenants in common, and not as joint-tenants, *and for want of such issue*, then in trust for the use of the right heirs of the survivor of himself and his wife for ever." The issue of this marriage, were two daughters. *Henry Littledale* died in 1779, leaving his wife and daughters surviving him. In 1793 and 1794, both the daughters died unmarried. On the 30th *May* 1781, the widow married *Anthony Benn* and had issue by him a son, *Robert Benn*, who is still living. She died on the 7th *February*, 1818. The question at the trial was, whether

the premises belonged to the plaintiff, as heir at law of the two daughters, or to Mr. *Robert Benn*, the eldest son and heir of the widow. The learned judge thought, that the daughters, under the settlement, took an estate in fee which descended from them upon the lessor of the plaintiff, and directed a verdict accordingly; and now

1818.

Dor
against
SMEDDLE.

Richardson, (by leave of the learned Judge,) moved to enter a verdict for the defendants. The question in this case is, what estates the children took under this deed. The words of limitation to the eldest son and his heirs, would import a fee; but as the limitation goes on to state, that from and after the determination of that estate, it should go to the second and other sons, and their heirs, it is quite clear, that the word "heirs," as used in the first limitation, must mean "heirs of the body;" for otherwise, his estate could not determine in the life-time of his second brother, who would be his heir general. The eldest son, therefore, took an estate tail; and the same reasoning exactly applies to the limitation to the second and other sons. Then comes the third limitation to the daughters; and it is fairly to be presumed, that the settlor, who had previously given estates tail to his sons, should intend to give the same estates to his daughters, and that the word "heirs," which, in the two former limitations, has been shewn to mean, "heirs of the body," should, in this limitation, receive the same construction. Besides, in this case, there is another limitation over, preceded by the words "and for want of such issue," which brings this case within the authority of *Leigh v. Brace*.^(a) There the limitation was, "to the use of

(a) *Carth.* 343.

1818.

Dox
against
SMEDDLE.

W. B. for life, and afterwards to the use of *T. B.* and his heirs for ever; *and for default of issue of the body of T. B.* then to the use of the right heirs of *W. B.*” And it was held, that *T. B.* took only an estate tail. That case, therefore, is precisely in point, and has never been expressly overruled. Then, here the limitation being to the daughters and their heirs, *and for want of such issue*, to the heirs of the survivor of the husband and wife, the daughters took only an estate tail, and the estate, on their death without issue, vested by the subsequent limitation in *Robert Benn*, the heir of the widow, who is therefore entitled to the premises.

ABBOTT C. J. The general rule of law is, that by the word “heirs” in a deed is meant heirs general, and even if it be admitted that there may be other expressions in the instrument, which from their nature may shew that the intention of the parties was to use the word in a more limited sense, still it by no means follows that the Court will adopt that limited sense, in those parts of the deed where the intention of the parties is not perfectly apparent. It may be admitted, in the present case, that the settlor, in the limitations to his first and other sons, used this word, as meaning heirs of the body. But if it were necessary, to form a judgment of what was his intention, when he used it in the limitation to his daughters, I should be of opinion, that it would be best effectuated by construing the expression as there meaning heirs general, and by holding that the daughters under it took estates in fee. It is, however, quite sufficient for the decision of this case, to say, that it is not plainly shewn, that in this limitation, the word “heirs” is used

in the confined sense of "heirs of the body." It follows, therefore, that the general rule of law must prevail, and that the word heirs must be taken in its larger meaning. Then if so, the daughters took in this case estates in fee; the consequence of which is, that the lessor of the plaintiff is entitled to recover, and that this verdict must stand.

1818.

Dor.
against
SMITH F.

HOLROYD J. Although it may be quite true, that the word heirs, in the respective limitations to the eldest and to the other sons, must in this deed, be construed to mean heirs of the body; yet it does not follow, that it must be so construed in the subsequent limitation to the daughters. For the word heirs is only to be construed contrary to its more usual sense, where that is necessary, in order to carry into effect the clear intention of the party using the expression. But where that is not necessary, there is no reason so to do, and the word must then be taken in its usual legal sense. Now, in the last limitation to the daughters, this necessity does not exist; and therefore the word heirs there must mean "heirs general." And if we were to hold, that it was to be construed as heirs of the body, great inconvenience would follow. For, according to *Doe v. Worsley* (a), there would be no cross remainders, inasmuch as cross remainders cannot be raised by implication. Lord Kenyon there distinctly lays it down, "that with regard to deeds the rule is positively settled, that there can be no implication whatever in a deed;" and that case expressly decided the point. We should therefore counteract the pro-

(a) 1 East, 416.

1818.

 Doe
 against
 SMEDDLE.

bable intention of the settlor, if we were in this case to hold, that the daughters of *Henry Littledale* were under the settlement to take estates in tail. For in that case, supposing that five out of six had died, it might happen that five-sixths of the estate would go over to the heir of their mother by her second marriage, instead of the whole vesting in the sixth and surviving daughter. That would, I think, defeat the intention of the settlor, and it therefore seems to me not only that there is no necessity for restraining the meaning of the word heirs to heirs of the body, in order to carry his intention into effect; but that in all probability we should actually counteract it if we were so to decide. I think, therefore, that this rule ought to be refused.

BAYLEY J. If there were a fair ground for doubt in this case, I should be of opinion that a rule to shew cause should be granted; but in truth no fair doubt can be entertained. It is to be observed that this is a case arising not on a will, but on a deed, and the circumstance of these being limitations of uses makes no difference, for according to the judgment of Lord *Holt* in *Idle v. Cooke* (a), limitations of uses must be construed according to the rules applicable to common law deeds. The word heirs may be used undoubtedly in the sense of heirs of the body, where the necessity of the case requires it. But where that necessity does not exist, there it must be taken to be used in its plain and natural sense, and to mean heirs general. Now, in the first limitation in this deed, the word is necessarily used in the restricted meaning, on account of the subsequent limitation

(a) 2 *Ld. Raym.* 1144.

to

to the second son. For the deed speaks of the determination of the estate of the eldest son, which could not happen if by the word heirs was meant heirs general, for there could be no failure of heirs general to the eldest son, whilst the second son remained alive. The same observations will apply to the limitation over to the second, third, and other sons. But in the limitation to the daughters there is not the same necessity to restrain the meaning of the word heirs. And if we were to do so, the inconvenience pointed out by my Brother *Holroyd* of the estate going over by parcels to the heir of the wife by her second marriage would be introduced, and in that case we should construe the word heirs contrary to the general rule of law, without knowing clearly whether, by so doing, we were carrying the intention of the settlor into effect. I think therefore that this verdict ought to stand.

1818.

—
Doe
against
SMEDDLE.

Rule refused.

GREAVES and Others *against* HEPKE and
Another.

Tuesday,
Nov. 10th.

ACTION for money paid, &c. Plea, non assumpsit.

At the trial before *Bayley* Justice, at the last *Lancaster* assizes, it appeared that the plaintiffs, who were

By the usage
of *Liverpool* the
vendor of goods
was to pay
warehouse rent
for two months
after the sale,

if the goods remained there so long: Held, however, that where the vendor of such goods had, within the two months, given the usual order for delivery to the purchaser, the property in the goods from that time vested in the latter, and that he became responsible for all accidents which might happen to them, and that the circumstance of the goods having within that time been distrained for warehouse rent, was an accident which must fall on the vendee, and such rent having been paid by the vendor's agent, in order to redeem the goods; held that the latter could not recover the same from the vendor as money paid to his use.

K 2

brokers.

1818.

GREAVES
against
HUTCH.

brokers at *Liverpool*, by order and on account of the defendants, who were merchants in *London*, sold to one *Maxwell* on the 4th *September*, 1817, a quantity of coffee, then being in a warehouse at *Liverpool*. On the 13th of *September*, *Maxwell* paid to the plaintiffs the purchase money, and received from them the usual order to the warehouse keeper signed by the original importer, for the delivery of the coffee; by which he was enabled to obtain *immediate* possession. The plaintiffs settled with the defendants in account for the same. The custom at *Liverpool* was that the purchaser of such goods should be allowed to let them remain in the warehouse where they were deposited for two months without paying any rent, the rent being for that time paid by the seller. Before two months had elapsed the goods were distrained by the landlord for rent, and the plaintiffs, in order to redeem them, paid the rent, and brought this action to recover the money from defendants. The learned Judge was of opinion that by the delivery order the property in the goods had vested in *Maxwell*, and that therefore the plaintiffs having paid the money without any necessity, it could not be considered as money paid for the use of the defendants, and directed a nonsuit.

Scarlett now moved to set aside the nonsuit, and contended, that as by the usage of *Liverpool* the warehouse rent for two months was paid by the seller unless the vendee removed the goods within that time, the property during those two months remained at the risk of the seller as to the rent, and the vendee was entitled, during that period, to have the goods delivered to him rent free. As to all other accidents it may be admit-

admitted that the risk was on the vendee, but this accident the custom expressly fixes on the seller. *Maxwell* then having a right to compel the delivery of the goods free from rent, it was absolutely necessary that the rent should be paid by the plaintiffs, and it must therefore be considered as money paid by them for the use of the defendants.

1818.

GREAVES
against
HEPKE.

ABBOTT C. J. I think that in this case it is quite clear that the property in these goods had become actually vested in *Maxwell* before they were distrained for rent. The contract is for immediate delivery; and by the order for delivery, *Maxwell* was enabled to obtain immediate possession. The sellers, therefore, had done every act on their part to be done, and the delivery to *Maxwell* was complete. It is true that by the usage of *Liverpool*, the seller is also to pay the rent of the warehouse for two months after the sale; but that is a matter of express stipulation, and does not by any means compel the latter to indemnify the purchaser against accidents occurring in the meanwhile. Suppose a loss by fire within the two months: that would undoubtedly fall on *Maxwell*, and the circumstance of the goods being distrained for rent due to the landlord of the premises is also an accident to which the goods are liable, and which must fall on *Maxwell* in whom they are vested at the time. Then if so, this sum of money has been paid by the plaintiffs in their own wrong, and the nonsuit was right.

BAYLEY and HOLROYD Js. concurred.

Rule refused.

1818.

Wednesday,
Nov. 11th.

ROBINSON and Others, Assignees of BELL and
CLARKSON, *against* M'DONNELL and Others,
Assignees of SHARP and Others.

A. and *B.*,
owners of a
ship, executed
an absolute bill
of sale to *C.*
and *D.* for a
nominal con-
sideration.

There was a
parol agreement
between them
that *C.* and *D.*
should accept
bills for the
accommodation
of *A.* and *B.*;
that the ship
should be a se-
curity to *C.* and
D. for any ad-
vances they
should make on
such accept-
ances, and that
until default
made by *A.* and
B. in providing
for the accept-
ances, the ship
should remain
in their posses-
sion and ma-
nagement.

The ship was
registered in
the names of

C. and *D.*; but *A.* and *B.* remained in the possession and management of her, appeared to the world as owners, and obtained credit from appearing so. Before default made by *A.* and *B.*, in providing for the acceptances, *C.* and *D.* became bankrupts, and their assignees immediately seized and sold the ship. *A.* and *B.* afterwards became bankrupts: Held that trover for the ship could not be maintained by their assignees against the assignees of *C.* and *D.*, for the parol agreement could not be set up against the bill of sale, and the case did not come within the statute of *James*, the ship having been seized by the defendants before the bankruptcy of *A.* and *B.*; and though the bill of sale unaccompanied by possession might be void as against creditors, it was binding upon *A.* and *B.* and their assignees.

TROVER for a ship called the *Glory*. At the trial at the *London* sittings after *Trinity* term, before *Abbott J.*, it appeared, that *Bell* and *Clarkson* being the owners of the ship in question, and another ship called the *Diana*, on the 16th *April*, 1812, executed bills of sale of both, to the *Sharps*, for the nominal consideration of 5s. The requisites of the register acts were forthwith duly complied with, and the *Sharps* appeared the registered owners of both vessels. *Bell*, who was called as a witness for the plaintiffs, stated that the real consideration for this bill of sale was, that the *Sharps* should accept *Bell* and *Clarkson's* bills to the amount of 12,000*l.*, and that the ships were to be a security for their advances upon such acceptances. But he swore that it was expressly stipulated, that the *Sharps* should not have the possession, management, or disposition of the ships, until default should be made by *Bell* and *Clarkson*, in providing for these acceptances, but that it should remain solely with *Bell* and *Clarkson*; that

after

after the bill of sale had been executed, the *Glory* was employed by them in carrying colonial produce to *Archangel*; that they appointed the master, and repaired and supplied her for the voyage, at their own expence, and appeared to the world as the owners; that they obtained credit as such; and that the debts so contracted remain unsatisfied. Upon the 1st *October*, 1812, the *Sharps* became bankrupts, and the defendants, on the 29th *October*, were appointed their assignees, and as such, seized the ship on her return from *Archangel* to the port of *London*. On the 4th *February*, 1813, *Clarkson* became bankrupt, and on the 18th *January*, 1814, *Bell* became a bankrupt, and the different plaintiffs were respectively appointed their assignees. No default had been made by *Bell* and *Clarkson*, in providing for the above acceptances, prior to the bankruptcy of the *Sharps*, or to the time when the ship was taken possession of by the defendants. The learned Judge directed a nonsuit; and now,

1818.

 ROBINSON
 against
 M'DONNELL.

Marryat moved to enter a verdict for the plaintiffs. The bill of sale executed by *Bell* and *Clarkson* was void, inasmuch as it was not accompanied by possession. Besides, in this case, it was expressly agreed, that the ship should not be in the possession of the supposed purchasers till a contingency, which had not happened when she was seized by the defendants. In *Mair v. Glennie* (a), the opinion of *Bayley J.* is strongly in favour of the plaintiffs' claim; for he there says, that upon the statute of *Eliz.*, he had no doubt that the parties in that case were bound to take possession of

(a) 4 *Maule & Selw.* 248.

1818.

 ROBINSON
 against
 M'DONNELL.

the ship as soon as an opportunity offered, and that by their neglect so to do, they had enabled *Mair* to hold out a false credit. So here, the *Sharps*, by not taking possession of this ship, enabled *Bell* and *Clarkson* to hold out a false credit to the world; and the bill of sale must, therefore, as against the assignees, who represent the creditors of *Bell* and *Clarkson*, be void; and if so, there was no defence to the present action.

ABBOTT C. J. In this case *Bell* and *Clarkson* executed a bill of sale of the ship to the *Sharps* for a nominal consideration, and the ship was accordingly registered in the proper form in the names of the latter persons. It appears, however, that they did not take immediate possession, but that *Bell* and *Clarkson* continued to act as owners of the ship, procured repairs to be done to her, and sent her on her voyage. And if the bankruptcy of *Bell* and *Clarkson* had happened at that time, there would have been no doubt that their assignees would be entitled to the ship; but in point of fact, the bankruptcy of the *Sharps* took place first, and their assignees, immediately on her return to *London*, took possession of her. Then as the order and disposition of the ship did not remain with *Bell* and *Clarkson* up to the time of their bankruptcy, the case does not fall within the statute 21 *Jac.* 1. I think, also, that it was not competent for *Bell* and *Clarkson* to avail themselves of the parol agreement, in contradiction to their own deed. The bill of sale might be void upon the statute of *Elizabeth* as against creditors, but not as against the parties who executed it; and their assignees are in this respect in no better situation.

BAYLEY J. The statute 21 *Jac.* 1. applies only where the order and disposition remain with the bankrupt up to the time of the bankruptcy, which was not the case here. And where there is a deed executed, under which it is competent for a party to take possession immediately, and he does not do so, but omits it for six months, I am not aware of any case which decides that such omission would be fraudulent, so as to make the deed void under the statute of *Elizabeth*. If indeed the right of any third person had intervened, the deed might be void as against them; but that is not the case here, for the bankruptcy of *Bell* and *Clarkson* did not occur till long after the assignees of *Sharp* had taken possession of the ship. The nonsuit therefore was right.

HOLROYD J. concurred.

Rule refused.

1818.

ROBINSON
against
M'DONNELL.

BARING and Others *against* CORRIE and Another.

Friday,
Nov. 13th.

ASSUMPSIT for goods sold and delivered. Plea, general issue. The cause was tried, before Lord *Ellenborough* C. J., at the *London* sittings after *Trinity* term, 1816, when a verdict was found for the plaintiffs, with 1423*l.* 3*s.* 6*d.* damages, subject to the opinion of the Court, upon the following case, either the plaintiffs or the defendants being at liberty to turn the same into a special verdict.

The plaintiffs are merchants in *London*, and in the debt due from the broker to him against the demand for the goods made by the principal.

The character of broker is materially different from that of factor; and, therefore, where a broker sells goods without disclosing the name of his principal; held that he acts beyond the scope of his authority, and that the buyer cannot set off a

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month of *June*, 1815, employed Messrs. *Coles*, as their brokers, to sell for them a parcel of sugars. *Coles* and Co. sold to the defendants the sugars on the 27th *June*, 1815, and on the same day delivered to the plaintiffs the following sale note: “Sold for account of Messrs. *Baring*, brothers, and Co., to Messrs. *W. and E. Corrie*, per *Active*, *N. L. R.* 51/100 — 50 hogsheads *Surinam* sugar, at 85s.” *Coles* and Co. were merchants as well as brokers, and bought and sold largely on their own account, and had before the time of the sale of the sugars in question dealt with the defendants both in buying and selling on their own account, and in the course of such dealing had previously bought goods of the defendants, for which they had given them their acceptances for 2700*l.*, which fell due on the 25th and 26th *August*, 1815. At the time of the sale, *Coles* and Co. did not disclose to the defendants that they acted as brokers, but sold the sugars to them in their own names, and sent them the following note: “Sold Messrs. *Corrie* and Co. per *Active*, *N. L. R.* 51/100 — 50 hogsheads *Surinam* sugar, at 85s. *June* 27th, 1815.” The defendants afterwards, on or about the 10th or 11th of *July*, 1815, received the following invoice, dated 27th *June*, 1815, from *Coles* and Co., “Messrs. *E. Corrie* bought of *Coles* and Co., per *Active*, *N. L. R.*, 50 hogsheads *Surinam* sugar, at 85s. per cwt.” The prompt or time of payment of the sugars, according to the usual course of the sugar trade, was two months. *Coles* and Co., as sworn brokers, kept a book, in which they entered a memorandum of every contract made by them as such brokers, and amongst the rest was the memorandum of the sale of these sugars to the defendants, made at the

time of sale: "Bought of *Baring, brothers, and Co.*, for account of *Corrie and Co.*, per *Active, N. L. R.* 51/100 hogsheads *Surinam* sugar, at 85s." But the defendants never saw the book or memorandum, nor did they ever desire to see it till after the bankruptcy of *Coles and Co.*, although they might at any time have seen it, by calling at the counting house. At the time of the sale, *Coles and Co.* were employed by the plaintiffs, as their brokers, not only to sell for them their imported goods, but also to receive from the buyers thereof the price when due, but they did not receive a del credere commission. *Coles and Co.* became bankrupts on the 14th *July*, 1815, and the prompt upon the sugars expired upon the 27th *August*. On the 3d *July*, the defendants received from *Coles and Co.* the following order for the delivery of the sugars from the *West India Docks*, where they were landed and then lying: "To the principal storekeeper of the *West India Docks*. Deliver to the order of Messrs. *W. and E. Corrie*, the under-mentioned goods, imported in the month of *June*, 1815, and entered by *John Deacon* per ship *Active*, Captain *Mustard*, from *Surinam*, (prime dock rates thereon being paid,) *June*, 1815, *N. L. R.* 51/100 — 50 hogsheads sugar. For *Baring, brothers, and Co.* (Signed) *John Walker*." *John Walker* was the custom-house clerk of the plaintiffs, and *John Deacon*, one of the partners in the house of *Baring, brothers, and Co.*, and one of the plaintiffs in the cause. By the usage in the *West India Docks*, the sugars, or other produce imported, remain in the names of the importer, or person making the entry, until such time as some purchaser thereof chuses to have the goods rehoused and entered in his name. In the mean time, and until such rehousing takes place, the order
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for delivery must be signed by the importer or his agent, whatever number of sales may have been made of them; and such order is made out for delivery to the first purchaser, unless the importer should have received a written direction from the first purchaser to make it out to some other person; and that person, if he sells, indorses over such order to his vendee, unless, as in the former cases, such vendee should in like manner, by order in writing, direct the indorsement to be made out to some other person. On the 22d *August*, 1815, the following letter, bearing date the 27th *July*, was sent by the plaintiffs to the defendants, being five days before the prompt, upon the sugars expired: "We request you will settle with Mr. *Edward Kensington*, for the amount of *N. L. R.* 50 hogsheads sugar, per *Active*, sold you by *Coles and Co.*, on the 27th *June* last." The defendants returned the following answer, dated *August* 23d: "We are surprized at the directions contained in your letter, dated 27th *July* last, but only delivered to us yesterday, respecting 50 hogsheads sugar sold by *Coles and Co.*, on the 27th *June*. We consider *Coles and Co.* as the proprietors of these sugars, and therefore the same will be settled for in account with them or their assignees." On the 14th *July*, 1815, when *Coles and Co.* became bankrupts, the defendants were the holders of their acceptances for 2700*l.*

This case was argued in *Easter* term by *Puller* for the plaintiffs, and in the present term by *Scarlett* for the defendants. The principal arguments for the plaintiffs were, that the defendants must have known that *Coles and Co.* were not selling in their own names, inasmuch as the truth of the transaction was registered
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in their broker's book, which the defendants might have inspected, if they had chosen to do so: and that the note delivered by them would not have bound the defendants unless it had been delivered in their character of brokers: that they possessed none of the indicia of property in the goods, all of which appeared to belong to the plaintiffs: and that it was impossible that the plaintiffs could know that the goods had not been sold by *Coles and Co.* in the ordinary way as brokers, for the note delivered to them was precisely in the usual form. And if they were not to succeed in the present action, no merchant could ever again trust a broker with safety. The cases of *George v. Clagett* (a), *Rabone v. Williams* (b), *Escott v. Milward* (c), *Scrimshire v. Alderton* (d), *Morris v. Cleasby* (e), and *Moore v. Clementson* (f), were cited, and it was contended that the rule on which the right of set-off in those cases depended was this, that where the principal has by his conduct allowed the factor to hold himself out to the world as the owner of the goods, he must take the consequences. Here, however, the plaintiffs had done no such thing; and, besides, all those cases were cases of factors, between whom and brokers there is a very material difference.

For the defendant, it was urged, that this case was not to be distinguished from *George v. Clagett*, which was still a valid decision: that as to the circumstances relied on, to shew that the defendants knew that *Coles and Co.* were selling as brokers they were not conclusive. It appeared as a fact, that they acted

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(a) 7 Term Rep. 359.

(b) 7 Term Rep. 360. n. a.

(c) Co. Bank. Laws, 236.

(d) 2 Str. 1182.

(e) 4 Maule & Selw. 566.

(f) 2 Campb. 22.

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both as brokers and merchants, and therefore a party with whom they dealt, might naturally enough in a case where they did not mention the name of their principal, conclude that they were the principals themselves in the transaction. And the order for delivery of the goods being given by the plaintiffs, made no difference, for the only thing that it proved was, that they were the original importers. The only distinction between a factor and broker is, that the one has possession of the bulk of the goods, and the other only of the sample; both are in the material point the same, viz. the representatives of the real owner. And the rule of law laid down in *Hern v. Nichols* (a) being that where one of two innocent persons must suffer by the fault of a third, the loss is to fall on him who has reposed the confidence, it will follow that in this case the loss must fall on the plaintiffs, whose agents *Coles and Co.* were in this transaction, and who had reposed an unusual confidence in them, by permitting them not merely to sell for them, but also to receive the price of the goods when sold.

ABBOTT C. J. If the defendants were to succeed in this case the effect would be that the goods of one man would be applied in discharge of the debt of another. I am not disposed to come to such a conclusion unless compelled to do so by authorities which I do not find in this case. It is said that where a loss is to fall on one of two innocent parties by the deceit of a third, that it should fall on him who employs and puts a trust and confidence in the deceiver. But this rule is by no means universal. Suppose a factor, who is entrusted

(a) *Salk.* 289.

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with the possession of goods, pledges the goods, the real owner may recover them in trover against the person with whom they are pledged. And so, also, if a master trusts his servant with plate or other valuables, and the servant sells them, still, unless they are sold in market overt, the master may recover them from the innocent purchaser. These exceptions shew that the principle is by no means universal. But in this case has there been any negligence on the side of the plaintiffs? or rather has there not been great negligence on the side of the defendants? *Coles and Co.*, it appears, acted in the double capacity of merchants and brokers; and that fact was well known to the defendants. Now the distinction between a broker and factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not. And at all events they knew that he had a right to sell the goods. But the case of a broker is quite distinguishable. The plaintiffs in this case have only reposed the usual confidence which every merchant must place in his

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his broker, and if the defendants should succeed, it would not be safe for any merchant ever hereafter to employ a broker: for the latter might, by delivering to the buyer a false note, defeat the rights of his principal altogether. It is argued, indeed, that there are other facts in this case from which it is to be inferred that the plaintiffs reposed a more than usual confidence in *Coles and Co.*, and for this purpose that part of the case was relied upon which states that they were employed by the plaintiffs as their brokers, not only to sell for them the several goods imported into this country, but also to receive, when due, the price of such goods from the buyers. But inasmuch as this fact applies only to the receipt of the price of goods sold by them *as brokers*, it seems to me that that fact does not alter the case. But in what situation did the defendants stand in respect to *Coles and Co.*, and what did they omit to do? They knew that *Coles and Co.* acted both as brokers and merchants, and if they meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have enquired whether in this transaction they acted as brokers or not; but they make no enquiry. They had the name of the ship in which the goods had been imported, and they might have made enquiries into the circumstances of the case, if they had not chosen to remain in ignorance. There is, therefore, a clear omission on their part, and they do not stand in a situation so completely free from blame as the plaintiffs do. There is another circumstance, which shews that if they did not know that *Coles and Co.* were acting as brokers in this case it was because they chose not to know it. It appears that they received a sale note, and were not required to sign a bought

bought note. Now without entering into the question whether or not, under such circumstances, the bargain could be enforced, it is quite sufficient to say, that the ordinary course of dealing was not pursued, and that enough appears to shew that the defendants negligently abstained from making those enquiries which they ought to have made. I think, therefore, that they ought not to be allowed the set-off which is claimed; and my opinion is founded on the difference between the characters of factor and broker, and on the plain distinction between the cases cited and this. For even admitting it to be true that where two persons, equally innocent, are prejudiced by the deceit of a third, the person who has put the trust and confidence in the deceiver should be the loser, I think the defendants are the persons who have in this case placed a more than usual confidence in *Coles and Co.*, and that they must bear the loss occasioned by the act of the latter.

BAYLEY J. I am entirely of the same opinion. This is an action brought by a merchant, to recover the price of his own goods, and he ought therefore to succeed, unless payment, or something equivalent to it, appears to have taken place. The demand, however, is resisted on the ground that the defendants, who were buyers of the goods, did not purchase them of the plaintiffs, but of *Coles and Co.*, and that they have a counter-demand against them, which they are entitled to set-off against the price of the goods. A proprietor, generally speaking, is entitled to receive the price of his own goods, unless, by improper conduct on his part, he has enabled some other person to appear as proprietor of the goods, and, by that means, to impose

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on a third person without any fault on the part of that person. That is the true meaning of the rule laid down in *Horn v. Nichols*. (a) There arise then three questions; first, did the plaintiffs enable *Coles* and Co. to appear as proprietors of the goods, and to practise a fraud upon the defendants? secondly, did *Coles* and Co. actually practice a fraud? and thirdly, did the defendants use due care and diligence to avoid such fraud? All these questions must, under the circumstances of this case, be answered against the defendants. It appears that *Coles* and Co. were both brokers and merchants, and that they on the 27th *June*, 1815, were empowered to sell the goods in question. They delivered to the plaintiffs a sold note exactly in the proper form, supposing them to have sold in their character of brokers; and they delivered to the defendants a bought note, exactly suited to the case of their having sold as brokers, without having disclosed the name of the seller. If it were even doubtful whether *Coles* and Co. sold as merchants or not, there was at least enough to have induced the defendants to make inquiry. For, supposing them to sell in their character of brokers, it was not necessary for them to take a counter-note from the defendants; but, if they had sold as merchants, that would be necessary. When, therefore, they delivered only a sale note, and required none in return, that ought to have raised a strong presumption in the minds of the defendants, that the sale was in their character of brokers. And there is nothing inconsistent in that view of the case: for *Coles* and Co. do not say that they sell the goods as their own, and the defendants ask no questions on that sub-

(a) *Salk.* 289.

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ject. Then, on the 3d of *July*, comes the delivery order signed by the plaintiffs: at that time, therefore, the defendants must have known that the plaintiffs were parties concerned, and might have satisfied any doubts which they entertained upon the subject. It is besides to be observed that the plaintiffs did not trust the brokers with either the muniments of their title, or the possession of the goods, as was done both in the case of *Rabone v. Williams*, and that of *George v. Clagett*. There is another circumstance by which the defendants might easily have ascertained whether *Coles and Co.* acted as brokers or not. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, and in fact that was done in this case; so that if the defendants had asked to see the book, they would instantly have discovered whether *Coles and Co.* acted as brokers or not. I think, therefore, that it appears from these circumstances, the plaintiffs did not by their conduct enable *Coles and Co.* to hold themselves out as the proprietors of these goods, and so to impose on the defendants; that the defendants were not imposed upon, and even supposing that they were, that they must have been guilty of gross negligence. Besides, when *Coles and Co.* stood at least in an equivocal situation, the defendants ought, in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I therefore cannot think that the defendants believed, when they bought the goods, that *Coles and Co.* sold them on their own account; and if so, they can have no defence to the present action. The course of dealing, it appears, was for the brokers to receive for

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the plaintiffs the price when due; if therefore the defendants had remained ignorant of the state of things, till after that period had arrived, the case might have been different; but, before that time arrived, it appears that they were distinctly informed, that the plaintiffs were the proprietors of the goods. There must therefore be judgment for the plaintiffs.

HOLROYD J. I am of opinion, that the defendants have not any right of set-off in this case. A factor, who has the possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority: and it may be right therefore, that the principal should be bound by the consequences of such sale; amongst which, the right of setting-off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorize him to sell in his own name. If therefore he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said, that by these means, the broker would be enabled by his principal to deceive innocent persons. The answer however is obvious, that that cannot be so, unless the principal delivers over to him the possession and indicia of property. The rule stated in the case in *Salkeld* must be taken with

with some qualifications; as for instance, if a factor, even with goods in his possession, acts beyond the scope of his authority, and pledges them, the principal is not bound: or if a broker, having goods delivered to him, is desired not to sell them, and sells them, but not in market overt, the principal may recover them back. The truth is, that in all cases, excepting where goods are sold in market overt, the rule of caveat emptor applies. I think therefore, that this case differs materially from the cases cited, which are those of principal and factor, and that therefore this claim of set-off cannot be allowed.

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Judgment for Plaintiffs.

The KING *against* The Inhabitants of IDLE.

Saturday,
Nov. 14th.

UPON an appeal against an order of two justices, by which *Mary Wade* and her bastard child were removed from the township of *Idle* to the township of *Rawden*, in the west riding of the county of *York*, the Sessions confirmed the order as to the mother, but discharged it as to the child, subject to the opinion of this Court on the following case:—

The pauper *Mary Wade*'s settlement, was admitted to be in the township of *Rawden*, derivatively under her father *John Wade*. For several years prior to the 4th October 1817, the said *John Wade* was an efficient member of a friendly society, legally established in pur-

The 35 G. 3 c. 101. did not repeal 33 G. 3. c. 54. And, therefore, where an unemancipated daughter was delivered of a bastard child in the township of *I.* during her father's residence there, under a certificate acknowledging him to be a member of a Friendly Society, established under 33 G. 3. c. 54.

Held that such certificate extended not only to him, but to all the members of his family also; that the daughter, therefore, was at the time of her delivery residing in the township under the authority of 33 G. 3. c. 54., and that by sect. 25. of that act the settlement of the child followed that of the mother.

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suance of the act passed in the 33d year of his present Majesty's reign, entitled "An act for the encouragement and relief of friendly societies." And on the 4th *October* 1817, a certificate as to that fact was duly made and given by the president and stewards of the society; and the same was afterwards duly verified before, and certified by, a magistrate, according to the provisions of the several statutes made concerning friendly societies. [The case then proceeded to set out the certificate, which was in all respects regular.] This certificate, and the verification thereof, were, on the 7th *October* 1817, delivered to the churchwardens and overseers of the poor of the township of *Idle*. — The bastard child was born in that township on the 19th *November* 1817, whilst *John Wade* and his family (of which the said *Mary Wade* was then a member) were residing there under the authority, or supposed authority, of the certificate and the acts relating to friendly societies.

Topping and *Starkie*, in support of the order of sessions. The 35 G. 3. c. 101. repealed the 33 G. 3. c. 54. the friendly society act. For the former act made all persons irremoveable till actually chargeable, and the only object of the 33 G. 3. was to exempt members of friendly societies from being removeable till actually chargeable. The latter act, therefore, was virtually repealed by becoming unnecessary. But, at any rate, this woman was not living under the authority of the 33 G. 3. when the child was born; for even supposing that act unrepealed, still its protection only continues till the person becomes actually chargeable: and here, being pregnant of a bastard child, she was
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by 35 G. 3. c. 101. s. 6. actually chargeable. Then, if so, she was removeable. If the parish officers might have removed her, she was not living under the authority of the act; and then the child will be settled where born, which was in the township of *Idle*. The case of *Rex v. Great Yarmouth* (a), is an authority to shew that an unmarried woman with child, though residing under a certificate, under 8 and 9 W. 3. may be removed; and the same reasoning will apply to certificates under the friendly society act. Besides, in this case, the certificate is not granted to the woman herself, but to her father, and the twenty-fifth clause only applies to members of friendly societies, and not inclusively to their families also. The daughter might therefore have been removed, notwithstanding the father's continuing to reside, being a member of the society under the authority of the act.

Scarlett and *E. Alderson*, contra. The 33 G. 3. cannot have been repealed by 35 G. 3., for many of its provisions are still in force, and are wholly untouched by the latter act: as, for instance, the clause which states that the servants and apprentices of such certificated persons shall not gain settlements thereby. Then, if not repealed, this woman was residing under the authority of the act. It is found by the case that she was a member of her father's family at the time, and the certificate extends not merely to him, but to his family. This has been decided in the case of certificates under 8 and 9 W. 3.; and *Rex v. Great Yarmouth*, cited on the other side, is an authority on

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(a) 8 Term Rep. 68.

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that point. And the words of 8 and 9 W. 3. are precisely similar to those of 33 G. 3. The seventeenth clause says, that the party shall not be removed till he be actually chargeable, or be found to ask relief *for himself and family*; and that then, and not before, it shall be lawful to remove him, *together with his family*. In truth, the rule laid down is, that the pater-familias includes his family, and that a certificate granted to him is virtually granted to his family also. Then, does 35 G. 3. c. 101. make any difference? That act was passed to prevent unnecessary removals. But inasmuch as unmarried women with child were sure to bring burthens on parishes, unless removed before delivery, that act made them actually chargeable. Where, however, this inconvenience did not exist, viz. in cases where the bastards, when born, would follow the mother's settlement, it was natural to expect that such power of removal (being unnecessary) should not be given. And accordingly there is a proviso introduced at the end of the sixth section for that purpose, which states that "all acts touching bastard children shall remain in full force, as well in cases where by this act the place of settlement of such child is directed to be the same as that of the mothers of such children, as where the place of settlement of such children remains the same as before this act." This proviso, therefore, limits the operation of the sixth section to cases where the removal is necessary, in order to prevent the child from being settled where born: and therefore this case is not within the clause. This is strongly supported by what fell from the Court in *Rex v. Great Yarmouth*. But even supposing that the mother in strict law was removeable, still it does not follow that the officers of
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Idle were bound to have removed her; and if they did not, she may still be considered as residing under the authority of 33 G. 3. And the other township has lost no advantage; for, if the mother had been removed, the child would have been born there, and so would have been clearly settled with them: and that is all that is sought to be done now.

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ABBOTT C. J. This case has been most fully and satisfactorily discussed, and the opinion I had originally formed has been changed in the course of the argument. I am of opinion that the original order of the two magistrates was good, and that the sessions were mistaken in their judgment. It has been argued that the friendly society act was repealed by the subsequent act of the 35 G. 3. c. 101, which provides that no person shall be removeable from any parish until actually chargeable, and thus, it is said, rendered wholly unnecessary the former protection by certificate under the friendly society act. But I think that is not so: for it may be very convenient, notwithstanding the effect of the 35 G. 3. to keep the provisions of the 33 G. 3. in force. In many cases, a labourer who might wish to come into a parish might not be able to obtain employment there, for fear that, by so doing, he might bring burdens upon the parish. But if he came with a certificate from a friendly society, that fear would be removed. It would therefore be depriving the members of such societies of a material benefit, if we were to hold the 35 G. 3. to be a virtual repeal of the provisions of the 33 G. 3. Then the question arises, who are the persons protected by the latter act? The object of the act being to facilitate the finding of employment,
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it should receive a liberal construction. I think, therefore, that the certificate granted to the head of the family protected not only him, but also all the members of the family, and placed them in the same situation in which he stood. If so, then they would not be removeable till they became actually chargeable. According to the authority of the case of *Rex v. Great Yarmouth*, this woman, under the circumstances stated to us, was removeable; but although that was so, still it may be very questionable, whether, in this particular case, the parish officers were bound to remove the mother? There is an obvious distinction between the effect of a certificate under the 33 G. 3., and that of one under 8 and 9 W. 3. For the former of these two statutes enacts, "That every child born a bastard in a parish during the mother's residence therein under the authority of that act, shall have the same settlement as the mother." The attention, therefore, of the parish officers would naturally not be called to the situation of a woman residing under a certificate granted under 33 G. 3., and I think, therefore, that they were justified in not removing in this case. No inconvenience can arise to the other parish from this; for if the mother had been actually removed, the child would have been born in their parish, and so would have been settled there. They, therefore, are placed in no worse situation by our holding that the child shall follow the mother's settlement, though she was not removed. I think, therefore, that the parish officers were not bound in this case to remove the mother, and that the child being born in *Idle*, whilst the mother was residing there under the authority of the 33 G. 3.

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c. 54., followed her settlement in *Rawden*, and that the order of sessions was therefore wrong.

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BAYLEY J. I entertained at first great doubts in this case, which the discussion it has undergone has however entirely removed. I agree with my Lord C. J. that the child in this case was settled in the parish to which the mother belonged, and on the ground that her residence there was protected by the 33 G. 3. c. 54. Before that act passed, persons likely to become chargeable were liable to be removed. That act, however, provides, that a person having a certificate under it shall not be removed unless actually chargeable. The first question is, whether that is repealed by the 35 G. 3. c. 101, by which a general provision is made, that no person shall be removed until actually chargeable. But unless we see clearly that it was the intention of the legislature to repeal the former act, I think we ought not to come to that conclusion; for that act gave to persons certificated under it a special protection, subject to certain disabilities; and I think that a party who chooses to avail himself of that special protection, ought to be allowed to do so; for it will materially facilitate his admission into a parish on account of the disability he lies under of communicating settlements. If he goes with that certificate, he will be readily allowed to take a tenement, for he confers no settlement on his hired servants or apprentices. Although, therefore, the 35 G. 3. c. 101. did introduce a general provision, still, as it does not contain any thing to shew that it was intended to repeal the 33 G. 3. c. 54, I think that act was not repealed. By the 17th section it appears that no member of a
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friendly society shall be removeable. He, therefore, obtains a residence not only for himself, but also for those who may be considered as parcel of himself, his wife, and family. If he is removed, they are removed with him; and the section which says that he shall not be removed, virtually prohibits also the removal of his family. The 25th section does not use the expression, "during the member's residence," but "during the mother's residence," under the authority of the act. I think, therefore, that in this case the mother was residing under the authority of this act when the child was born. The parish might perhaps have removed the mother as actually chargeable, under the 35 G. 3. c. 101. s. 6., but they were not bound so to do; for this section only meant to provide for the case of those unmarried women, whose residence, when they were pregnant, was not protected by any previous act. I think, therefore, that in this case the settlement of the child follows that of the mother.

HOLROYD J. I am also of opinion that the 33 G. 3. c. 54. is not repealed by the 35 G. 3. c. 101. It certainly is not expressly repealed, for there is no reference in the latter act to the 33 G. 3. By that act it appears that members of a friendly society are protected unless they become actually chargeable, or are found to ask relief for themselves and family; and in case any daughter shall become pregnant of a bastard, the 25th section enacts, that the child in that case should follow the settlement of the mother. Under this act, a daughter in this situation would not make the family removeable as actually chargeable, because, not being settled there herself, the birth of her child would bring no charge on the parish. Then came the 35 G. 3.

the object of which has been correctly stated to be, to prevent poor persons from being unnecessarily removed; and the sixth section enacts, that an unmarried woman with child shall be deemed and taken to be a person actually chargeable; but that clause goes on to state that such a person shall be deemed chargeable, not generally, but “within the true intent and meaning of that act.” Then that clause applies to persons whose residence was not previously protected, but not to cases where under the friendly society act, the certificate would protect the parish, where the child was born, from the burden of its maintenance: and no mischief will follow from this construction of the act. I am therefore of opinion, that the 33 G. 3. is not repealed by the 35 G. 3., and that the settlement of the child in this case follows that of the mother.

Order of Sessions quashed, and
order of Magistrates confirmed.

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against
The Inhabit-
ants of
IDLK.

The KING *against* The Inhabitants of the Parish
of WALSALL.

Saturday,
Nov. 14th.

PULLER, in last *Easter* term, had obtained a rule to shew cause why an order of appointment of four persons to be overseers of the parish of *Walsall*, in

The two dis-
tricts of which
a parish consist-
ed had, from
the 43 *Eliz.*
down to the

13 and 14 *Car. 2.*, maintained their poor jointly, and at the time of the passing of the latter act agreed to separate in the maintenance of their poor, and that separate overseers should be appointed, upon condition that the rateable property in the parish, whether situated in the one or the other district, should be rated where the occupiers resided. In consequence of that agreement they had ever since uniformly maintained their own poor separately, and had had separate overseers, constables, &c.: Held that this clearly shewed that the parish, at the time of the agreement, could not reap the full benefit of the statute of *Eliz.*, and that, therefore, the separation of the two districts was valid, and that an appointment of overseers for the whole parish was now bad.

Held also, that the agreement consisted of two distinct parts, and that the invalidity of the latter part, as to rating property not situate within the district rated, did not affect the question on the former part.

the

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against
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ants of
WALSALL.

the county of *Stafford*, should not be quashed for insufficiency. It appeared from the affidavits in support of the rule, that the parish of *Walsall* consisted of two districts, one called the township of the *Borough*, and the other the township of the *Foreign*, both of which, as far back as the 13 and 14 *Car. 2. c. 12.*, had separately maintained their own poor; that they had had separate rates, accounts, and workhouses, and separate appointments of overseers, constable, and headborough; that there had been parish indentures, executed by the officers of the *foreign*, so far back as 1689; certificates of settlements, given by the *borough* to the *foreign*, as far back as 1700; and orders of removal from the *borough* to the *foreign*, and vice versâ, and appeals thereon, as far back as 1744, and as late as 1815. The affidavits on the other side stated, that prior to the statute of the 13 and 14 *Car. 2. c. 12.*, the parish of *Walsall* received the benefit of the 43 *Eliz. c. 2.*, and that the poor of the *borough* and *foreign* were maintained by a general rate over the whole parish; that on the passing of 13 and 14 *Car. 2. c. 12.*, it was agreed, that the *borough* and *foreign* should separate in the maintenance of their poor, and that separate overseers should be appointed, upon condition that the rateable property in the parish, whether situate in the *borough* or the *foreign*, should be rated to the relief of the poor of that district, in which the occupier resided. They also stated, that both townships had been incorporated by the name of the *Borough and Foreign of Walsall*, and that the jurisdiction of the magistrates extended over the whole parish; that there was but one parish church for both, which was repaired by a joint rate; that a rate of 1s. in the pound, averages in the

borough 125*l.*, and in the *foreign* 400*l.*; and that in the last year, there were thirty-two of the former, and eleven of the latter; and that the parish now could have the benefit of the 43 *Eliz.*, by the joint maintenance of their poor; that by so doing, a considerable expence would be saved, and the poor would be more comfortably provided for. It appeared, that on a previous appeal against the poor's rate for the *borough*, argued in the Court of *King's Bench*, in 1813, the latter part of the agreement, stated in the affidavits, was held to be invalid; and it was in consequence of this that the joint appointment of overseers for the whole parish now in question, was made.

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against
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ants of
WALSALL.

Jervis and *W. E. Taunton* shewed cause. The statement in the affidavits in support of this rule, which is admitted to be correct, viz. that separate overseers, rates, &c. have existed since the 13 and 14 *Car. 2.*, both in the *borough* and the *foreign*, is not decisive of the present question; for those existed in the case of *Rex v. Palmer* (a), and in *Lane v. Cobham* (b), and yet the Court sustained an appointment of overseers for the whole parish, and refused a mandamus to appoint separate overseers for the different districts. It is not stated, in any of those affidavits, that the parish cannot now reap the benefit of the statute of *Eliz.*; and the affidavits on the other side distinctly state that the parish can do so. And it appears, from the facts admitted on both sides, that the parish, during the interval between the 43 *Eliz.* and 13 and 14 *Car. 2.*, did reap the benefit of the former statute, by maintaining their poor

(a) 8 *East*, 416.(b) 7 *East*, 1.

jointly.

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ants of
WALSALL.

jointly. [*Bayley J.*, There is the fallacy of the argument; the parish, during that interval, did reap some, but not the full benefit of the statute.] Supposing that the agreement stated affords evidence of the inconvenience felt by the joint maintenance of the poor at that time, still that does not fall within the definition given by *Buller J.*, in *Rex v. Horton (a)*, for he there says, that what is meant by the benefit of the statute of *Eliz.* is, “that the parish may maintain their own poor *as a parish*; for unless they can do it as such, they cannot have the benefit of the statute.” Now that has been done in this case by the parish of *Walsall*. In *Rex v. Newell (b)*, it was held, that where two districts contributed in certain proportions, each to the maintenance of the poor in the other, and had immemorially made separate rates, still they were not entitled to maintain their poor separately. The principle of that case applies to the present; for here, by the agreement, the property in each district, has contributed to the relief of the poor in the other; and it can make no difference, whether the proportions were fixed, as in *Rex v. Newell*, or fluctuating, as in the present case. And the authority of *Rex v. Gordon (c)*, is strongly against the present application.

Marryat and *Puller*, contra, were stopped by the Court.

ABBOTT C. J. The court is now called upon to unite two townships which as far back as human memory can go have been in all respects separate and distinct; and

(a) 1 *Term Rep.* 374.
(c) 1 *Barn. & Ald.* 524.

(b) 4 *Term Rep.* 266.

indeed

indeed the documentary evidence stated in the affidavits carries the separation back for a century and a half. Every circumstance that could possibly exist to shew that these were distinct townships for all purposes is found in the present case. The fair result of the whole evidence is this, that at the time of the passing of the 13 and 14 *Car. 2.*, two distinct opinions were entertained by the inhabitants of this parish. The first of which was, that they could not reap the benefit of the 43 *Eliz.*; and the second, that property should be rated to the poor in the township where the occupier resided. On the latter point their opinion has now changed; and they think that the property now ought to be rated according to the rules of law. But that does not shew that they were wrong in the former opinion that the parish could not reap the benefit of 43 *Eliz.* for the two parts of the agreementt are perfectly distinct. I think therefore that this case furnishes satisfactory evidence that this parish could not and cannot reap the benefit of the statute, and that this appointment of overseers for the whole parish is bad.

BAYLEY J. I am of the same opinion. The Court ought not, except on the plainest grounds, to disturb a practice which has prevailed for so long a series of years. The case of *Rex v. Palmer* only decided that where a parish has, with the consent of all its districts, re-united itself; that re-union is valid in law. But this is an attempt to recede from the agreement to separate without the consent of both parties. The meaning of the words "benefit of the statute of 43 *Eliz.*" is "the full and ordinary benefit of that statute," and if a parish cannot receive that full and ordinary benefit, it comes within

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against
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ants of
WATFALL.

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against
The Inhabit-
ants of
WALSALL.

the stat. 13 and 14 *Car.* 2. Now where, in point of fact, a parish has long been separated, and has had separate overseers, &c. that is surely very strong evidence to shew that it could not originally derive the full and ordinary benefit of the 43 *Eliz.* As to the agreement, I fully concur with my Lord C. J. that it consists of two distinct parts, and that any alteration as to one part will not affect the other. I think, therefore, that this rule should be made absolute.

Rule absolute. (a)

(a) *Holroyd J.* was absent in the Bail Court.

The KING *against* The Inhabitants of SAUGHTON- ON-THE-HILL.

The pauper, being a settled inhabitant of *A.*, subsequently acquired a settlement in the township of *B.* The latter township afterwards ceased to exist as a place capable of maintaining its own poor: Held, notwithstanding that the previous settlement in *A.* having been extinguished, the pauper could not be removed thither from a third town as to the place of his *last* legal settlement.

TWO justices by their order removed *Joseph Gill* and his wife from the parish of *St. Bridget, Chester*, to the township of *Saughton on the Hill*, in the county of *Chester*. The sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case:

The pauper, *Joseph Gill*, being a settled inhabitant of the township of *Saughton on the Hill*, about twenty years ago acquired a subsequent settlement, by renting a tenement in the township of *Gloverstone*, in the parish of *St. Mary on the Hill*, in the city of *Chester*, in which parish there are several townships, each separately maintaining its own poor. Of these townships *Glover-*

Quære, Whether in such a case a removal to the parish of which the township of *B.* formed a part would not be good.

stone

stone was one, and was situated in the county palatine, and not in the city. At the time the pauper obtained a settlement in *Gloverstone* it was a township, having overseers and maintaining its own poor, which continued to be the case until about ten years ago, when all the houses in the township were taken down for the purpose of enlarging *Chester* castle. There are now no buildings in the township of *Gloverstone*, except part of the courts of the county, and some barracks and other buildings belonging to the Barrack Board. No overseers have been appointed for the township of *Gloverstone* for the last ten years, and there is no place within the township inhabited by persons capable of being appointed overseers.

J. Williams, in support of the order of sessions, contended that by the place of the pauper's last legal settlement, to which by the statute of 13 and 14 C. 2. the magistrates have jurisdiction to remove him, must be meant the last available legal settlement; for that construction should be adopted which most easily enables the act to be carried into execution: and the object was to fix the burthen of maintenance on those who had received the benefit of the service of the pauper. And if this removal be not good, the pauper in this case will have a right to reside wherever he pleases, without being removed. It cannot be said that the removal ought to have been made to the parish of *St. Mary*; because the parish having been divided into townships, each township for this purpose is as a separate parish. The parish, therefore, of *St. Mary* is quite as distinct from the township of *Gloverstone* as any other parish in the kingdom.

M 2

W. D.

1818.

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against
The Inhabit-
ants of
SAIGTON-ON-
THE-HILL.

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The KING
against
The Inhabit-
ants of
SAIGHTON-ON-
THE-HILL.

W. D. Evans, contra. The right of removal depends on positive law; and if a person be not expressly brought within the words of a statute he cannot be removed: for at common law every one is irremovable. Then, is he within the words here? They only empower magistrates to remove to the last legal settlement: and that was the township of *Gloverstone*, as is admitted in the case. Then, if so, the magistrates have no jurisdiction to remove him to any other place. But 2dly, it may well be contended that the parish of *St. Mary* was the proper place to which the pauper might be removed; for the statute 43 *Eliz.* imposed the burthen upon the parish, and the division into townships depends on 13 and 14 *Car. 2.*, and exists only under particular circumstances. And it may be said that if the parish are not liable, it is for them to shew some one of the townships within the parish which is liable, in order to exonerate themselves. He was then stopped by the Court, who said that it was unnecessary further to discuss the second question, as they thought the first point was clearly in his favour.

ABBOTT C. J. The authority of magistrates to remove paupers exists only, and is derived from the express provisions of an act of parliament; and, in a new case, the best mode for the Court is to form their judgment on the very words of the act. There may be many cases where a pauper, having no settlement in the place where he may happen to be, may still not be removable from it; either because he has no settlement at all, or because the parish officers are not enabled to discover the place of his settlement. The words of the act are, that any two justices of the peace may, by their warrant, remove

and convey persons likely to be chargeable to the parish where he or they were last legally settled. It is therefore enough for the Court, in deciding this case, to say that *Saughton* is not the parish where the pauper was last legally settled, inasmuch as he appears to have subsequently acquired a settlement in *Gloverstone*, by which the former settlement was extinguished. The justices, therefore, in this case, had no authority to remove the pauper, and the sessions have done wrong in confirming their order.

BAYLEY and HOLROYD, J^s. concurred.

Both orders quashed.

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against
The Inhabit-
ants of
SAUGHTON-ON-
THE-HILL.

DAVIS and Another *against* JONES and Another.

Tuesday,
Nov. 17th.

TROVER for five jibs. Plea, not guilty. At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after *Trinity* term, 1817, the jury found a verdict for the plaintiffs for the value of the jibs, subject to the opinion of the Court upon the following case:

By lease of the 31st *May*, 1755, *T. W.* demised for sixty-one years to *E. P.*, certain premises therein described, comprising among other buildings, a warehouse, and the lessee covenanted to repair the same with all erections and buildings which during the term should be erected upon the premises, and to deliver the same to the lessor at the end of the term. The interest of the lessee was afterwards assigned to the plaintiffs, and the premises having during the term been destroyed by fire, the plaintiffs rebuilt them, and on

Certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant: Held that these were the goods and chattels of the outgoing tenant, for which he might maintain trover.

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that

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that occasion put up the five jibs in question. Certain caps and steps of timber were fixed into the buildings, and the jibs were placed in these caps and steps, and are the uprights that turn round the work in the caps and steps. They are fastened by pins above and below, and may be taken in and out of the caps or steps *without injuring either them or the building*; but they cannot be removed without being a little injured themselves. Jibs of this description, unless scheduled in the leases of warehouses, *are usually valued between out-going and in-coming tenants*. The plaintiffs continued in possession of the warehouse and of the jibs, until the expiration of their term in 1816, when they delivered up possession of the premises to their landlord, without prejudice to their right to remove these jibs and other tenants' fixtures. The premises were afterwards, *May 9th 1816*, demised to the defendants; and the question for the opinion of the Court was, whether or not the defendants were liable in trover for not delivering up these five jibs to the plaintiffs who were the outgoing tenants. The case was argued at *Serjeants' Inn*, before this term, by *Chitty* for the plaintiff, and *Comyn* for the defendant. For the plaintiff it was insisted, that these jibs having been fixed up for the purposes of trade, might be removed by the tenant, *Elwes v. Maw*. (a) And that in *Penton v. Robart* (b), it was held that the tenant might remove them after his term had expired: that it appeared that these articles might be removed without injuring the freehold; and that the fact of their having been usually valued between the incoming and out-going tenant, shews that they were

(a) 3 *East*, 28.(b) 2 *East*, 88.

generally

generally understood to be the property of the latter. For the defendant it was insisted, that these things constituted part of one entire machine, of which the other parts were fixed to the freehold, and that they did not come within the description of goods and chattels, *Horn v. Baker* (a), *Lee v. Risdon* (b), and therefore that trover would not lie for them.

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 DAVIS
against
JONES
Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This case was argued before us at *Serjeants' Inn*: but upon consideration we think it depends upon a conclusion of fact to be drawn from the matters stated in the case, and not upon any point of law. If these jibs are to be considered as personal chattels, the plaintiffs did not lose their property in them, by leaving them on the premises in the manner mentioned in the case. And supposing the property to have remained in the plaintiffs, so that they might lawfully demand and reclaim them from their landlord, they may also lawfully demand and reclaim them from the present defendants, who claim title under the landlord, and can have no title if the landlord had no title to confer. On the other hand, if the jibs are to be considered as annexed to and parcel of the freehold, then admitting that the plaintiffs might have removed them during the term, as being erections for the benefit of trade, yet they could not after the term, maintain trover for them; because the action of trover is maintainable in respect of personal chattels only. Upon the matters stated, we think the proper conclusion of fact is, that these things were (at least as between

(a) 9 *East*, 215.(b) 7 *Taunt.* 188. 2 *Mars.* 495.

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against
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landlord and tenant, and persons claiming under either of them) personal chattels. The mode, by which they might be removed is not very clearly explained, but it is expressly found that they might be removed without injuring the caps or steps in which they are placed, or the building: and it is further found, that they are usually valued between out-going and in-coming tenants. Such a practice could not rationally have prevailed, if the things had not been generally understood to be in their nature capable of removal, and not fixtures properly so called; and therefore taking the practice as an explanation of their nature and character, we think they are to be considered as personal chattels, and consequently that this action of trover may be maintained, and that the *postea* should be delivered to the plaintiffs.

Judgment for Plaintiffs.

Tuesday,
Nov. 17th.

DOE, on the Demise of FREEMAN, *against*
BATEMAN.

A., being possessed of a term of years, demised his whole interest to *B.*, subject to a right of re-entry on the breach of a condition: Held that *A.* might enter for the condition broken, although he had no reversion.

EJECTMENT for two messuages, in the parish of *St. Luke, Chelsea*. The demise was laid on the 26th *December* 1817. The cause was tried at the sittings after *Easter Term*, 1818, before *Abbott J.*, when a verdict was taken for the plaintiff, subject to the opinion of the Court, on a case which stated in substance as follows: — The defendant *Bateman* being possessed of a term of years in the premises in question, by a lease dated 12th *May* 1812, demised the premises to *Freeman*, the lessor of the plaintiff, for a term co-extensive with his own term, reserving rent, and subject to certain conditions, one of which
was,

was, that *Freeman* should not open a public-house on the premises without the licence, in writing, of *Bateman*. The lease contained the usual clause for re-entry in case of a breach of any of the covenants or conditions. *Freeman* entered into the premises, and afterwards opened a public-house without having obtained the licence in writing of *Bateman*; and the latter having entered for the breach of this condition, this ejectment was brought by *Freeman* to recover the possession. This case was argued by *Curwood* for the plaintiff, and *Taddy* Serjt. for the defendant. For the plaintiff it was contended, that the defendant having parted with his whole term, had no reversion, and therefore no right of entry for the condition broken; that, upon assigning his whole interest to the plaintiff, the privity of estate was destroyed, and that a right of entry could not be reserved to, or exist in, a stranger. On the other side it was insisted, that the condition was not destroyed by the defendant's having granted away the whole reversion; and the following authorities were cited, *Litt. s. 347. 5. Vin. Ab. 312. pl. 17. Bac. Abr. tit. Condition, E. Co. Litt. 202. a.*

Cur. adv. vult.

ABBOTT C. J. now delivered the opinion of the Court. This case was argued before us at *Serjeants' Inn*, and upon the facts found, the single question of law was this, whether a lessee for years, having made a conveyance operating as an assignment of his whole interest in the land, containing a covenant on the part of the assignee not to open a public-house on the demised premises without licence, and containing also a clause of re-entry on breach of the covenant, could

upon

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against
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upon an actual breach thereof enter upon the land and avoid his conveyance. Or, in other words, whether, if an assignment of a term of years be made upon a condition, the assignment shall be absolute and the condition void. No question arose as to the capacity of a real or personal representative to make the entry; for the entry was made by the assignor himself. The only argument adduced against the right of entry or validity of the condition was, that an entry must always be made by a person entitled to the reversion, and by no other; and consequently that as the original termor had in this case, by the deed of assignment, parted with his whole estate, and no reversion was left to him, he could not enter. And, to be sure, if the premises here assumed be true, the conclusion is properly drawn. But we think the premises from which the conclusion was drawn are untrue. And that they are untrue is manifest from the familiar case put in *Lit.* sect. 325, of a feoffment in fee rendering rent, with a clause of re-entry, if the rent be unpaid; in which case it is said the feoffor or his heirs may enter for the condition broken. In this case, the feoffor has no reversion; the lands are not, nor since the statute of *Quia Emptores*, can be holden of him, but must be holden of the superior lord of the fee. Another instance is also mentioned in *Lord Coke's* commentary upon this section, *Co. Lit.* fo. 202. According to the text of *Littleton*, the party making the entry shall have and hold the land in his former estate; but according to the commentary, although this is regularly true, yet it faileth in many cases, and one of the cases of failure is that of a feoffment in fee upon condition, made by a man seised in right of his wife. The feoffor dieth,

and the condition is broken. The heir of the feoffor shall enter; yet the heir at the time of his entry hath no reversion, and after the entry his estate doth vanish, and presently the estate is vested in the wife. For these reasons, we think the defendant was entitled to the verdict, and the postea must be delivered to him.

Judgment for defendant.

1818.

DOE
against
BATEMAN.

FARRER *against* BILLING.

Tuesday.
Nov. 17th.

IN an action of replevin, the issue was, Whether the soil and freehold in the lands in which the distress was taken, was at the time of such taking, in *William Mason*? The affirmative of the issue lay on the defendant. This cause was tried at the last assizes for the county of *Norfolk*, before *Dallas J.*, when a verdict was found for the defendant, subject to the opinion of the Court, upon the following case:

The land in question was part of the waste or common lands of the Manor of *Nicton*, otherwise *Ncighton*, in the county of *Norfolk*. In the year 1815, an act passed for enclosing lands in that parish, by which a power was given to the commissioners, on giving

By the general inclosure act the legal title to an allotment is not acquired until the execution and proclamation of the commissioners' award. And where a local act directed that the commissioners by notice might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors, and that the owners might

fence their allotments after they had been marked, staked out, and confirmed, and before the signing of the award, and might also, within three months before the execution of the award, sell and convey their interests in the allotments, the commissioners being thereby authorized to allot to the purchasers, and the latter, after the execution of the award, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that where the allotments were copyhold, that the deed should be enrolled in the court-rolls of the manor, and that the purchaser should be admitted tenant thereto at the same time as the other allottees of copyhold lands, viz. after the execution of the award: Held that this authority to enclose and so to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given) be enjoyed and exercised without the legal seisin of the land; and that, therefore, these provisions, not sufficiently countervailing those of the general inclosure act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award.

certain

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FARRER
against
BILLING.

certain notices to allot the waste and common lands of the Manor, and to extinguish all rights of commonage over the same, and to authorise the persons to whom such allotments were made, to take possession of and fence and inclose the same. The notices were duly given, and the other formal requisites of the act were duly complied with; and in the month of *February* 1816, the rights of commonage over the said close were extinguished. On the 13th *March* 1816, the commissioners made an order for the proprietors to take possession of their allotments from that date. The place in which, &c. was allotted to *Mason*, and he took possession of it before the time when, &c. In the month of *August* following, the plaintiff's cattle were taken damage feasant; and, in the month of *April* 1817, the award of the commissioners was executed according to the provisions of the recited act, and of the statute of the 41 G. 3. c. 109., by which award the allotments were awarded to the respective proprietors. The question was, Whether the soil and freehold of the locus in quo before the execution of the award passed to *Mason* by virtue of the allotment?

This case was argued by *Robinson* for the plaintiff, and *Blossett* Serjt. for defendant. But the Court, in giving judgment, went so fully into the case that it became unnecessary to state the arguments; in the course of which, *Kingsley v. Young* (a), *Sugden on Purchases* (b), *Cane v. Baldwin* (c), were cited.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This case was lately argued before us at

(a) 17 *Ves.* 468. 18 *Ves.* 207. (b) *p.* 289. (c) 1 *Starkie*, 65.

Serjeants'

Serjeants' Inn ; and the question is, whether the close whereon the plaintiff's cattle were taken, was, at the time of the taking, the soil and freehold of *William Mason* : And that question turns upon the construction and effect of the general inclosure act, 41 G. 3. U. K. c. 109. ; and the local act mentioned in the case, which passed in the 55th year of his Majesty's reign. It may be observed, that the case does not state how, or at what time, or in respect of what right or interest the land in question was allotted to Mr. *Mason*. If it was allotted to him in respect of a copyhold or leasehold tenement, it could not possibly become his freehold under the act : and in this respect, therefore, the case itself is defectively drawn. But as it appears by the preamble of the local act, that Mr. *Mason* was the owner and proprietor of houses and lands within the parish, and as the course of the argument before us proceeded upon an admission that this was intended as a freehold allotment, and that the land in question would have become his freehold upon the execution of the award, we have taken this to be the real fact. Supposing, then, the place in question to have been allotted to Mr. *Mason*, in respect of freehold hereditaments, the question is, had it actually become his freehold at the time of the distress taken. He might have such a right to the exclusive possession and enjoyment as would authorize him to distrain the plaintiff's cattle, and to justify the distress by a plea specially framed upon the acts of parliament, without having a legal or actual seisin ; but unless he had such seisin, the cognizance in its present form was not proved : and we are of opinion that he had not. The statutable enactments that bear upon this question are to be found, partly in the general, and partly

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partly in the local act. By the general acts, s. 8. and 10., the commissioners are required, in the first place, to set out public roads, and, in the next place, private roads. By s. 17., persons to whom allotments shall be made are required to accept their allotments within two months *after the execution of the award*, or in default, they forfeit all right and interest in the lands to be inclosed. By s. 14., the shares which shall be assigned and allotted shall be taken in full bar and satisfaction of all rights; and, after the making of the division and allotments, *and execution of the award*, or at such other time as the commissioners shall in a particular manner direct, all rights of common and other rights shall be extinguished. By s. 19., after allotments made, and before execution of the award, the persons to whom allotments shall be made are enabled, with the consent of the commissioners, to enclose and fence their allotments in such manner as the commissioners shall direct. By s. 35., as soon as conveniently may be after the division and allotment shall be finished, the commissioners shall form and draw up their award in writing, which must express, amongst other things, the quantity of acres, roods, and perches, of each and every of the lands allotted; the award is to be engrossed on parchment, and to be read and executed in the presence of the proprietors, at a meeting to be held on notice given; the execution is to be proclaimed in the parish church on the next Sunday, *from the time of which proclamation only, and not before*, the award shall be considered as complete. From these enactments in the general act, it appears to us, that the actual division and staking out of the lands, and the assigning or allotting them to different persons, are preparatory measures

measures only, of which the final completion is afterwards to be effected by the execution and proclamation of the written award; and, consequently, that unless the effect of these is varied by those of the local act, a legal title to an allotment is not acquired before the proclamation of the award. It remains, therefore, to examine and consider the enactments of the local act.

By the local act, power is given to the commissioners by a notice in writing published as therein directed, to cause all rights of common to be extinguished. This as appears by the case, was in fact done before the distress taken. By this act also the commissioners are required in the first place, if they think proper or necessary, to assign and allot a portion of the lands for public watering places, sand, and gravel pits: in the next place to allot a specified portion to the owners of the soil: in the next place to allot certain small quantities to the owners of messuages or cottages, having rights of common; and then to assign and allot the residue among the owners and proprietors of, and persons having right or interest upon, the lands and grounds which are the subject of the act. And as soon as the commissioners shall have ascertained the rights and interests of the proprietors, and the shares and proportions proposed to be allotted to them, they are to give notice in writing of a convenient time and place where the proprietors may be informed of such proposed allotments, and may see the scheme thereof upon a map or plan to be produced; and, as some of the proprietors may be dissatisfied with the proposed allotments, the commissioners are to receive statements in writing of objections, and afterwards to determine the same,

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same, and their determination as to such allotments shall be final and conclusive. It is then further enacted that the several allotments shall be enclosed and fenced in such manner as the commissioners shall direct, and that it shall be lawful for the proprietors, after their allotments shall have been marked, staked out and confirmed, and before the signing of the award, to fence their allotments in such manner as the commissioners shall direct. Then follows a clause by which it is enacted, that if any owner shall at any time within three calendar months before the execution of the award (which seems to mean at any time not less than three months before the execution) sell and convey his right, interest, and property in or to the lands or grounds to be divided, or in or to any allotment which shall be set out or *intended* to be made by the commissioners in full or part satisfaction of any such right, interest, or property as aforesaid, the commissioners shall make an allotment to the purchaser, and the purchaser may, *after execution of the award*, hold the allotted land in such manner as the vendor might have done, if there had been no sale. Provided that every such deed of sale, if it relates to any interest appurtenant to copyhold land, or to any allotment to be set out in respect of copyhold land, shall, to give it complete effect, be enrolled or entered in the Court Rolls of the manor, and shall have the effect of a surrender entitling the party to be admitted tenant, at the time hereinafter prescribed, for the admission to copyhold lands *after the execution of the award*. The time here mentioned is ascertained by a subsequent clause, by which it is enacted that all grounds to be allotted by virtue of the act, in respect of copyhold messuages or lands, or in respect

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respect of leasehold lands or tenements or in respect of any right of common appurtenant to copyhold or leasehold premises, shall, *from and after the execution of the award*, be deemed to be copyhold or leasehold accordingly; and every person to whom any copyhold lands shall be allotted, shall, within six months next after the execution of the award, be admitted tenant to the same without payment of any fine to the lord. And the commissioners are required to determine and describe by their award or by the map or plan to be thereto annexed, the several allotments which are to remain or become copyhold or leasehold; and all other allotments (except such as shall be ascertained by the commissioners to be copyhold or leasehold) *shall thenceforth be deemed, taken, and enjoyed as freehold*. The word "*thenceforth*" in this place must mean from and after the execution of the award, and such an enactment would have been useless, if the allotted land could have been deemed freehold by the facts of allotment, division, extinguishment of commonable rights, and authority to fence and enclose, and to sell and convey, *before the execution of the award*. These authorities to fence and enclose, and as a consequence thereof to enjoy in severalty, and the power to sell and convey, (adverting especially to the language in which that power is given by this local act, and to the measures to be taken upon its execution,) being derived from an act of parliament, may well be enjoyed and exercised without the ownership or seisin of the land, and while the legal seisin remains in some other person, until some further measure contemplated by the act, shall be carried into execution, as the full and final close and perfection of all antecedent matters. This may be, and upon consideration

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of the different parts of the local statute upon which the case has arisen, we are of opinion that this was intended to be; and consequently that the allegation of soil and freehold in the defendant's cognizance was not proved. Our opinion does not impugn any of the decisions that were cited at the bar, or the opinion of the learned Judges of the Court of Chancery as reported in the case of *Kingsley v. Young*. The language of the local act upon which that case arose was different from that of the act under our present consideration. The legislature may certainly, by proper words, give the seisin and legal estate upon the allotment only, and before execution of the award. But we think the present act does not contain any words proper for that purpose, or indicative of such an intention; that such an effect is not necessary to the objects of the act, and that the act contains expressions importing that the freehold or other interest should not become a legal estate before the execution of the award. And therefore the postea must be delivered to the plaintiff.

Judgment for Plaintiff.

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The KING *against* The Inhabitants of NETHER-
THONG.

Wednesday,
Nov. 18th.

INDICTMENT against the defendants, for non-repair of a road situated within their township. The prescription stated was, that the inhabitants of the township of *Netherthong*, in the parish of *Almondbury*, from time immemorial, had repaired, and had been accustomed to repair, and still of right ought to repair, when the same should be necessary, such of the common king's highways, situate within their township, as but for such usage and prescription would have been repairable by the parish at large. The road indicted was part of a turnpike road made under the provisions of a local act, passed in 1768, intituled "An act for diverting, altering, widening, repairing, and amending the road from *Huddersfield*, in the West Riding of the county of *York*, to *Woodhead*, in the county palatine of *Chester*, and from thence to a bridge over the river *Mersey*, called *Enterclough Bridge*, on the confines of the county of *Derby*." Before, and at the time of passing the act, no part of the antient high road for the diverting, &c. of which that act was made, passed through any part of the township of *Netherthong*. But there was an occupation bridle-way in that township, which previous to the passing the act had never been repaired at the expence of the township. About the year 1770, part of this occupation bridle-way, and some adjoining land in the

Where a local turnpike act, after empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees out of the money arising by virtue of the act: Held that this only made the tolls an auxiliary fund in the hands of the trustees, and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for non-repair of the road.

Held also, that such inhabitants may, after conviction, apply by motion for relief against the trustees under 13 G. 3. c. 84. s. 33.

Held also, that 13 G. 3. c. 84. s. 63.

only refers to

diversions under writs of *ad quod damnum*, and under 13 G. 3. c. 78. s. 19.

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township of *Netherthong*, were purchased by the trustees under the act for the purposes thereof, and thrown into and made part of the new turnpike road; and thus, for the first time, a part of that road was made to pass through the township of *Netherthong*. This was the part of the road indicted. It was admitted, that the inhabitants of *Netherthong* were liable to the repair of all roads locally there situate, as charged in the indictment. Under these circumstances, the jury, at the trial, before *Wood B.*, at the *York* summer assizes, 1816, found a verdict for the Crown; but on a motion being afterwards made in this court, in *Michaelmas* term, 1816, by *Scarlett*, to set aside this verdict, and to enter a verdict for the defendants, the Court ordered the facts to be put into a special case. The following clauses in the local act were referred to in the argument. It was enacted, "that the lands, &c. purchased by the trustees, should be made use of and converted into, and be made part of the said road, in such manner as the trustees, or any seven or more of them, should think convenient and proper. And that the lands so to be converted into, and made part of the said road, should be sufficiently ditched and fenced out for that purpose, and from time to time repaired out of the money arising by virtue of that act, by such person or persons as such trustees, or any seven or more of them, should order, direct, or appoint; and that the new road should, to all intents and purposes, from thenceforth become, and be deemed and taken to be a public highway." The act contained a proviso, that nothing therein should be construed to be a discharge of any county, parish, township, &c. from the performance of statute work

work upon, or otherwise repairing, any road, bridge, &c., which they or any of them respectively have been accustomed, or of right ought to repair, by reason of the tenure of any lands, or by antient usage, or otherwise; but that all and every such road, bridge, &c., should thereafter be kept in repair, by such county, parish, township, &c., as heretofore the same respectively had been kept in repair.

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E. Alderson, for the Crown. It is admitted that the prescription laid in the indictment was proved: then if so, this township is in the same situation as a parish with respect to highways; and therefore, if a new highway is brought into the township, the inhabitants will be liable to the repair of it. *Aspindall v. Brown*. (a) It is to be contended, that here the trustees of the road and not the township are liable. But the only effect of that clause, in the local act, is to make the tolls in the hands of the trustees an auxiliary fund. The trustees are a fluctuating body, and are not liable generally, but only where they have funds; and it is not in the power of a prosecutor to ascertain that fact. It is therefore better that the inhabitants of the township, who are a fixed body, and can be known, should be held responsible, and that the tolls should be an auxiliary fund in the hands of the trustees. This was in fact decided by *Rex v. St. George's, Hanover Square* (b), which was a much stronger case than the present; and the way for the township to make the tolls available to them is clearly pointed out by 13 G. 3. c. 84. s. 33.

(a) 3 Term Rep. 265.

(b) 3 Campb. 222.

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Richardson, contra. The clause in the local act expressly makes the trustees liable; and this case differs from that cited, because here the inhabitants of a township are indicted, and there the indictment was against the parish. But secondly, it appears here, that no part of the old road passed through *Netherthong*; and the proviso expressly states, that nothing in the act shall be construed to be a discharge of any parish, &c., from any previous liability. The old road, which was diverted, was repairable by some other township; and if the inhabitants of *Netherthong* are held liable to repair the present road, that will operate as a discharge of the inhabitants of the other town through which the road formerly passed. And he cited 13 G. 3. c. 84. s. 63. on this point.

E. Alderson, in reply. There is nothing stated in this case to shew, that the old road does not still subsist in the adjoining township. So that the facts stated do not raise the second point. And if they did, it is clear that 13 G. 3. c. 84. s. 63. only relates to those cases where roads were turned by order of two justices, in order to make the same nearer or more commodious, which power was given by 13 G. 3. c. 78. s. 19. And the clause in question places those diversions on the same foundation as those made by virtue of a writ of *ad quod damnum*, where the persons bound to repair the original road were also liable to the repair of the diverted road. *Ex parte Vennor and Others.* (a) Besides, the local act in this case passed in 8 G. 3., five years before the clause relied on by the defendants.

(a) 3 Atk. 772.

ABBOTT C. J. By the general rule of law, the inhabitants of any district who were liable to the repair of all the roads there, previously to the introduction of a new highway, are also liable to the repair of that highway. And the same rule extends to county bridges: for the statute which passed to limit the liability of the county to those cases only where the new bridge is substantially built, shews sufficiently that, by the common law, they would otherwise be liable to the repair of all new bridges which might be erected within their district. Then, in this case, there is a new highway brought into the township of *Netherthong*. And it follows that the inhabitants, who by the prescription stated in the case are in effect placed in the same situation as that of the inhabitants of a parish, are liable to the repair of this new highway. And the proviso in the local turnpike act expressly says, that nothing therein contained shall exempt them from the liability which belongs to them. Then, can the clause which binds the trustees to repair make any difference? It is strange, if the trustees are liable, that in the multitude of turnpike acts, almost all of which must contain similar provisions to the present, no case has yet occurred of any indictment being preferred against persons in that situation. I think, therefore, that the trustees are not liable by way of indictment, and that the only persons who are so liable are the present defendants. If, however, they think proper to do so, they may still apply to this Court for relief, under the clause pointed out in the 13 G. 3. c. 84.

BAYLEY J. When the local act made this road a public highway, for all intents and purposes, it must be

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considered as having made it so with all the legal incidents belonging thereto, amongst which is its liability to be repaired by the inhabitants of the district who repair the other public highways there. I think that the tolls, in this case, are only an auxiliary and subordinate fund, and that the persons whom the public have a right to hold liable are the inhabitants of the township, who may afterwards apply to this court for relief, under the 33d clause of the general turnpike act. It is, however, contended that, in this case, the obligation to repair did not attach upon the inhabitants of *Netherthong*; because, previously to the passing of the local act, no part of the road was there situate, and therefore the liability was on the inhabitants of the other town, out of which the old road had been diverted. It would be quite enough, in answer to this, to say that there is no fact here stated which shews that the road in question was substituted for another road which now no longer exists. But I think also, that the 63d clause, referred to in the 13 G. 3. c. 84., relates to diversions made either by writs of ad quod damnum, or by the powers given to two justices by the statute of the 13 G. 3. c. 78. s. 19. Upon the whole, I am of opinion that the inhabitants of *Netherthong* are liable to the repair of this road, and that the clause making the trustees liable does not furnish any defence to the present indictment.

HOLROYD J. I am of the same opinion. If this had been an indictment against the parish at large, it is quite clear that they would have been liable for the repair of this road; for there are no facts stated which shew that the obligation is thrown on any other persons. Then, the prescription stated in the present indictment shews

shews that this township is, as to all roads within it, a parish. And therefore, when a new highway is brought into it, it becomes subject to the *lex loci*, as to the repairs. Then, if so, inasmuch as there is not any thing to shew that by law either the trustees, or the inhabitants of any other township, are liable to repair this road, that burthen must fall upon the present defendants,

Judgment for the Crown.

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against
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ants of
NEWMATHON.

The KING *against* The Inhabitants of DEBENHAM. *Wednesday, Nov. 18th.*

ON an appeal against an order of two justices, by which *John Driver, Margaret* his wife, and *John* their son, were removed from the parish of *Debenham* to the parish of *Kenton*, in the county of *Suffolk*, the sessions quashed the order subject to the opinion of this court on the following case.

The pauper had gained a settlement by hiring and service in the parish of *Debenham*, unless it could be shewn that his father at the time resided in that parish under a certificate from the parish of *Kenton*. It was proved that no such certificate could be found in the custody of *Debenham*. The pauper's father, *James Driver*, proved, that in the year 1771, having been removed from *Debenham* to *Kenton*, the parish officers of *Debenham* refused to allow him to return, unless *Kenton* would grant him a certificate: to this the parish officers of *Kenton* consented. An order for granting this certificate was made at the quarterly meeting of the directors and guardians of the incorporated

On an appeal, the respondents, in order to prove the fact of the delivery to them of a certificate given by the appellants, acknowledging the pauper to be their settled inhabitant, produced an old book from their own parish chest, in which was an entry of that fact in the hand-writing of a former parish officer. Held that such evidence was inadmissible.

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rated hundreds of *Loes* and *Wilford*, (in which *Kenton* is situated,) as appeared by an entry in the minute book of the proceedings of the Hundred-house quarterly meetings, dated 20th *March*, 1771. And to prove that such certificate was delivered to the respondent parish in pursuance of such order, a book was produced from the parish chest of *Debenham*: on the outside of the cover was “*Certs. Recd., Bonds do., Coppys of Orders, 1756.*” This book contained memorandums of orders of removal, of bonds, and certificates received. The certificates were regularly numbered, and under the title of certificates received was the following entry, dated 1771. “*No. 88. John Polkins from Kenton, No. 89. James Driver, do.*” There were a variety of other certificates subsequently entered. The sessions were of opinion that this book was not admissible in evidence.

Nolan and *Dover* in support of the order of sessions. This evidence was not admissible. There is not any good ground of distinction between contending parishes and contending individuals. If this had been the case of an individual, there could be no doubt that his own books could not be produced in evidence for himself. These entries are made by the parish officers, and for their own benefit. The only case at all resembling this is the case of entries made by a previous incumbent which are evidence for his successor. But that has always been considered as an excepted case. And the rule is so laid down by Lord *Kenyon* in *Outram v. Morewood*. (a) By 42 G. 3. c. 46. parish in-

(a) 5 Term Rep. 125.

dentures

indentures are to be copied into a book provided for that purpose, and the book after being allowed by two justices is to be made evidence where the original indentures are proved to be lost. Now all these provisions could not have been necessary, if this book be admissible in evidence.

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ants of
DERRYHAM.

Scarlett and Primrose, contra. Independently of the book, there were sufficient circumstances stated in this case from which the sessions ought to have concluded that this certificate had been delivered. But the book was admissible. It was not produced to prove the contents of the certificate, as is the case of the book containing copies of the parish indentures under the 42 G. 3., but only to shew the fact of the delivery. And it is evidence of that. Besides this is in the nature of a public document; for it is kept in the parish chest, and by a public body. And this distinguishes the case from *Outram v. Morewood*, which was an entry made in a private book by an individual.

ABBOTT C. J. The principles of the law of evidence in this country are founded on the strongest sense, and soundest reasoning. It is of the first importance to preserve them strictly; inasmuch as they are the great safeguards of the subject in the administration of justice in all cases, from those involving property of the most trifling amount, to those where the life of an individual is at stake. I therefore should be extremely unwilling to come to any decision which should break in upon any established principle. It is an established principle, that nothing said or done by a person, having at the time an interest in the subject matter,
shall

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ants of
Dunstable.

shall be evidence, either for him or persons claiming under him. Now the entry in this book is of that description; for it is made by a person having an interest to make it, inasmuch as it is produced as proof of the delivery of a certificate by which the parish of which the party making an entry is an inhabitant is to be relieved from the burden of maintaining the individual named in the certificate. I think therefore that the safest course which the Court can pursue will be to hold that the sessions were justified in rejecting this evidence. There are, however, in this case, other circumstances from which the sessions may draw the conclusion (if they shall think fit so to do) that the certificate was in fact delivered. I think, therefore, that the case should go back to be reheard upon that point.

BAYLEY J. I am entirely of the same opinion, that the entry in this book was not evidence, the effect of it being to advance the interest of the person who made it.

HOLROYD J. concurred.

Case sent back to the Sessions to be reheard.

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The KING *against* The Inhabitants of HORN-
CHURCH.

Wednesday,
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TWO justices by their order removed *John Thurtell* and *Elizabeth* his wife, and their three children, from the parish of *Hornchurch* to the parish of *Parleigh*, both in the county of *Essex*: the sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case:

By grant dated *May 13th, 1799*, *James Thurtell*, the father of the pauper, obtained from the lord of the manor a piece of the waste in the appellant parish, where he built three cottages. The grant was as follows, viz. To this court came *James Thurtell*, of the parish of *Munden*, in his own proper person, and *Sarah* his wife, and prayed to be admitted tenant to all that piece or parcel of land or ground, being part of the waste land of this manor, containing by estimation about half a rood of waste land, a little more or less, with the cottage or tenement thereon, lately erected or built, paying to the lord the yearly rent of 2s. 6d., to whom the lord of the manor by his steward, with the consent of the homage, granted and delivered seisin thereof by the rod; to have and to hold the said piece or parcel of ground and premises, unto the said *James Thurtell* and *Sarah* his wife, and the survivor of them, and to the heirs and assigns of the survivor of them, of the lord of the said manor, at the will of the lord, by the rod, according to the custom of the said manor, (subject to such mortgage or conditional surrender as he the said *James Thurtell* alone, without

Where there is no custom for that purpose, the lord of a manor cannot make a new grant of copyhold; and if he does, the grantee acquires thereby no settlement by estate. Held also, that a grant by the lord of copyhold land, paying a yearly rent of 2s. 6d. (which rent in a subsequent part was called a quit-rent) is a purchase within 9 G. 1. c. 7., and being under 30l., confers no settlement.

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without the consent of his wife, shall make, according to the customs of the said manor, within six months from the date hereof, for securing any sum of money not exceeding the sum of 60*l.* and interest,) at the yearly quit rent aforesaid, and by suit of court and other customs and services of right due and accustomed; and he giveth to the lord for fine for such his admission nothing of the special favor of the lord, and so saving all right of the lord, he is admitted tenant as aforesaid, and his fealty is respited, &c. The sessions were of opinion that this grant did not confer such an estate upon the pauper's father as would give a settlement.

Knox and *Walford*, in support of the order, were stopped by the Court; who called upon

Broderick and *Stephen*, contra: It is not necessary in cases of this sort, that any thing more should appear than that the pauper's father had the substantial possession of this estate; and here he had it, for the lord could not have taken it from him, on account of his own grant; nor could the homage question it, because they had consented to the grant; and a stranger, it is obvious, could not interfere. The pauper's father, therefore, had the substantial possession of the estate; and the grant was not made for any pecuniary consideration, as was the case in *Rex v. Warblington*. (a) There there was a fine paid, but there is none here. The word "purchase," in the statute of the 9 G. 1. c. 7. is used in its popular sense, as denoting a purchase for money. *Rex v. Marwood*. (b) For there a voluntary

(a) 1 *Term Rep*, 241.(b) *Burr. S. C.* 386.

conveyance, without any pecuniary consideration, was held not to be within the statute. There is no pecuniary consideration here: the quit rent of 2s. 6d. not being given as a consideration for the estate, but only in lieu of the services.

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ABBOTT C. J. I think that this grant was not a valid conveyance of the copyhold estate, because there is no custom stated for the lord to make a new grant of copyhold within this manor. Unless that custom exists, there can be no copyhold except where the land has been at all times demised or demisable by copy of court roll. The lord, therefore, had no right to make this grant. But even if the grant were good, I should still think that this case fell within the 9 G. 1. c. 7., for here the land was originally demised for a mere money consideration, to be paid annually, and the sum stated in the case was a full consideration for all that the lord granted at the time. I cannot distinguish this case from *Rex v. Warblington*, which must govern our present decision. Then if the case falls within 9 G. 1. c. 7., it is clear that the consideration was less than 30*l.*, the sum required by the act.

BAYLEY and HOLROYD Js. concurred.

Order of Sessions confirmed.

CASES IN MICHAELMAS TERM

1818

Practise
New 1818

The KING *against* The Sheriffs of LONDON, in
the Cause of HOLLIER *against* CLARK.

Practise
Attachment.

At THE plaintiff sued the defendant as acceptor of a bill of exchange, and at the same time brought actions against the drawer and indorser. In this action against the acceptor he obtained an attachment against the sheriffs for not bringing in the body. An order was made by a judge at chambers, on the application of the defendant, that it should be referred to the master to compute what was due to the plaintiff on the bill, and that the attachment should stand as a security for the debt and costs. The master computed what was due on the bill, and taxed the plaintiff's costs in this action; but refused to include in his taxation the costs in the actions against the drawer and indorser.

Campbell now moved for a rule to shew cause why the master should not review his taxation, and why the attachment should not stand as a security for the debt and the costs in the three actions. He produced an affidavit, from which it appeared to have been the practice in the office of the sheriffs of London, that where an attachment has been obtained in an action against the acceptor of a bill of exchange, the costs of any actions commenced against the drawer or indorsers are always paid under the attachment. And he compared this to an application to stay proceedings in an action against the acceptor of a bill of exchange, in which the defendant is obliged to pay the costs in the

actions

actions against the drawer and indorsers. *Smith v. Woodcock, Same v. Dudley*, 4 T. R. 691. But

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The King
against
The Sheriffs of
London.

The Court said the practice which appeared to have prevailed in the office of the sheriffs of *London* was unreasonable. All that the plaintiff can expect from the sheriff is what he could have recovered in the action had he proceeded to judgment and execution against the defendant. Here the defendant would only have been liable for the debt and his own costs. The costs in the other actions could not have been laid as special damage, as those actions were commenced at the same time as that against the acceptor. The contempt of the sheriff is purged by placing the plaintiff in as good a situation as he could have been in had the defendant's body been brought into court.

Rule refused. (a)

(a) See *Windham v. Wither*, Str. 515.

HAY and Others, Assignees of MATTHEWS, a Bankrupt, against FAIRBAIRN.

Friday,
Nov. 20th.

ASSUMPSIT for money had and received by the defendants to the use of the plaintiffs as assignees of *Thomas Matthews* a bankrupt. Plea, general issue. The cause was tried before *Wood B.* at the assizes for the county of *Durham* 1817, when a verdict was found

The 21 Jac. 1. c. 19. s. 11. is not repealed as to shipping by the ship-register acts; and therefore when *A.*, the owner of a ship, duly assigned his in-

terest in it to *B.*, and *B.* became the registered owner, but by his permission, *A.* continued to have the same in his possession, order, and disposition, until he became bankrupt: Held that the property in the ship passed to *A.*'s assignees under the statute of *James*.

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HAY
against
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for the plaintiffs, damages 585*l.*, subject to the opinion of the Court on the following case.

Matthews the bankrupt, the registered owner of a ship called the *Dolphin*, being indebted to the defendants, by indenture on the 22d *November* 1815, (reciting the certificate of the registry of the ship,) assigned the ship then being at sea to the defendant *Fairbairn*, as a security for his debt. The deed contained a covenant by *Fairbairn* to re-assign the same to the bankrupt on payment of the debt; and that until the ship should be sold under the deed *the bankrupt was to be permitted to have, hold, and enjoy the same and to receive and take the gains and profits for his own use and benefit*. A copy of this deed was delivered on the 22d *November* to the proper officer of the custom-house at *Sunderland*; and on the return of the vessel the requisites of the register act were complied with so as to vest the legal interest in *Fairbairn*. At the time of the execution of the assignment the bankrupt had the possession of the ship, and continued from that time until his bankruptcy to exercise all the acts of ownership, by appointing captains, chartering the vessel, repairing and insuring the same at his own expence; but she was navigated under the certificate of registry which had been granted to the defendant in compliance with the register acts. The defendant never interfered in any way with the conduct or management of the ship until the 1st *June* 1816, when he took possession of the same, displaced the master from his command and re-appointed one under himself. The commission against *Matthews* issued on the 11th *May* 1816, under which he was duly declared a bankrupt. The defendant's demand upon the ship had been reduced by payments to about 595*l.*; he sold the ship, and the proceeds thereof

remained in his hands. The question for the opinion of the Court was, whether the bankrupt was not to be considered the ostensible owner under the stat. 21 *Jac.* 1. c. 19.

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HAY
against
FAIRBAIRN.

Tindal, for the plaintiffs. The bankrupt at the time of his bankruptcy had the ship in his possession, order, and disposition, by the consent of the true owner; and this case falls within the stat. 21 *Jac.* 1. c. 19. s. 11., unless the ship register act operates as a repeal of the former statute as far as ships are concerned. In *Robinson v. McDonnell* (a), T. 56 G. 3., this very point was decided by this Court. There *Bell* and *Clarkson*, the registered owners, executed a bill of sale to the *Sharps* as a security for advances which had been made by the *Sharps* to them. At the time of the execution of the bill of sale the ship was at sea; she returned the latter end of 1811. *Sharp* did not then take possession; but afterwards, in May 1812 the ship was registered in his name. Notwithstanding this alteration the ship continued under the orders of *Bell* and *Clarkson*, who exercised all the ordinary acts of ownership. The *Sharps* became bankrupts: the ship returned, and shortly afterwards *Bell* and *Clarkson* became bankrupts. Upon these facts this court were of opinion that *Bell* and *Clarkson* were the ostensible owners within the 21 *Jac.* 1. c. 19. s. 11.; and Lord *Ellenborough*, in delivering the judgment of the Court said "The register acts were passed for purposes of public policy, and the means adopted for effecting that object are such that every person claiming title through the medium of a conveyance as the act of parties must shew a conveyance of the

(a) *Salwyn*, N. P. 1142.

1818.

 HAY
 against
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form and character prescribed by those statutes. The plaintiffs did shew an original title in the bankrupts whom they represented, grounded upon such conveyances. Has that title been divested, as against them (they being the representatives also of the general body of creditors), by any other conveyance? It is admitted that deeds alone in the case of an unregistered ship would not have that effect, and we think the registration and new certificate cannot produce it. These statutes do not affect titles passing by operation of law, as to executors or administrators in case of death, or to assignees generally in case of bankruptcy. In these cases a title may be transmitted without any of the forms required by the statutes; and if a title may be transmitted without these forms in cases of bankruptcy generally, we see no reason why it may not be so done in a particular case falling within the scope and operation of the statute of *James*, though these forms have been complied with in a conveyance to others, i. e. the *Sharps*, such conveyance being fraught with all the mischief that statute was meant to prevent. The register acts make certain forms necessary to the validity of transfers and conveyances which antecedently would have been good and valid without them, but it was never intended by the legislature that a compliance with these forms should give validity to a transfer and conveyance which antecedently would have been bad and invalid, and we think such an effect ought not to be attributed to them."

The Court then called upon *Richardson*, who admitted that he could not distinguish this from the case cited, and they gave

Judgment for plaintiffs. (a)

(a) The case was afterwards turned into a special verdict.

1818.

THOMAS *against* VANDERMOOLEN.Friday,
Nov. 20th.**A**SSUMPSIT for goods sold and money count.

Plea, to counts for goods sold, a judgment recovered, and to the other counts payment. *Comyn* on a former day obtained a rule to shew cause why the plaintiff should not be at liberty to sign judgment notwithstanding these pleas, and why the defendant or his attorney should not pay the costs of the plea and of the application, on an affidavit that both pleas were false.

Where a sham plea was pleaded calculated to raise issues requiring different modes of trial, the Court suffered the plaintiff to sign judgment as for want of a plea, and made the defendant or his attorney pay the costs occasioned by the plea, and the costs of the rule for correcting the proceedings.

F. Pollock shewed cause. The Court will not try the truth of a plea on affidavit; and the effect of the present application, if successful, will be to make it necessary in every case for a defendant to verify his plea by affidavit, which, in the case of a plea in abatement, is required by statute. If it be objected that there were *two* false pleas, and that one only would have been free from objection, the Court cannot consistently admit such a distinction, and allow a defendant to plead *one* false plea, but restrain him from pleading *two*. As to sham pleas, the Court cannot notice them as such; and although in the case of *Blewitt v. Marsden* (a), a similar application succeeded, yet there the plea was not only false, but was calculated to bring ridicule on the proceedings of the Court. Secondly, he contended that the plaintiff having ruled the defendant to abide by the plea, had so far recognized it as a good plea, that he was stopped from now making this application, the Court having in a late case de-

(a) 10 *East*, 237.

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 THOMAS
 against
 VANDER-
 MOOLEN.

cided, that after such a rule the plaintiff could not treat the plea as a nullity and sign judgment.

BAYLEY J. (a) The Court has no disposition to introduce a new practice ; but the case of *Pierce v. Blake* (b), is an authority to shew what the duty of an attorney is with reference to this subject. There, *Holt* C. J. said, that he remembered a case where judgment having been given against a defendant above 40 years of age, he brought a writ of error, and assigned for error, infancy, and appearing by attorney, the Court fined the attorney for assigning those errors which were notoriously false and frivolous. Considering this, therefore, as an authority to shew that the Court may inquire whether an attorney has stated false facts upon the record, and may proceed against him accordingly ; and considering also that the Court has in recent cases expressed their disapprobation of these pleas which raise issues requiring different modes of trial, and thereby impose on the plaintiff an improper difficulty, I feel no hesitation in saying that this is a plea of that description, and therefore that this application ought to be granted. It is true that in this case there has been a rule to abide by the plea, but that makes no difference : in fact it puts the defendant on his guard ; for the rule leaves it to the party to abide by his plea or not, as he chooses ; and if he abides by it, he must do so subject to all its consequences.

HOLROYD J. I am of the same opinion. It appears from the case cited from *Salkeld*, that the Court may

(a) *Abbott* C. J. was absent.

(b) 2 *Salk.* 515.

inquire

inquire whether the plea was the act of the party, or the act of the attorney; and the late cases referred to in the course of the argument have also authorized this mode of proceeding.

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THOMAS
against
VANDER-
MOLEN.

Rule absolute, with costs.

BARTLEY against GODSLAKE. (a)

CAMPBELL obtained a rule upon a former day, calling upon the defendant to shew cause why the plaintiff should not be at liberty to sign judgment, as for want of a plea; and why the defendant, or his attorney, should not pay the costs of the plea and of this application. The action was upon a bill of exchange and the money counts. The defendant pleaded that the parties had accounted together, and that upon such accounting a certain sum of money was due from the defendant to the plaintiff; and that, in satisfaction of part, defendant indorsed to plaintiff a bill of exchange; and that, in satisfaction of the residue, the defendant assigned to the plaintiff a judgment obtained by the defendant in the Court of Exchequer in Ireland, in pursuance of an Irish act of parliament, enabling the conusors of judgments to assign the same. The plea then averred, that the bill was outstanding in the hands of a third person; and that the judgment remained in full force, as appeared by the record remaining in the Court of Exchequer in Dublin. An affidavit was produced that the plea was wholly false.

So also where the sham plea was such, as to make it necessary for the plaintiff's attorney to consult counsel, and thereby cause delay and expence, the Court suffered the plaintiff to sign judgment, and made the attorney pay the costs.

(a) This case was heard on a subsequent day in this term; but as it relates to the same subject as the former, it was thought right to report them together.

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BARTLEY
against
GODSLAKE.

Comyn, for the defendant, contended that this plea did not come within the rule laid down against sham pleas, as it did not require a double replication with two modes of trial, the plaintiff being at liberty to deny the indorsement of the bill, and the assignment of the judgment concluding to the country. But the Court said, that this being an ingenious plea, which the plaintiff's attorney could not be expected to understand, would put him to the necessity of consulting counsel, and thereby occasion delay and expence. It was therefore a very improper plea to be put upon the files of the Court. Upon this ground they made the rule absolute. And to prevent such pleas being pleaded in future, they directed that the defendant's attorney should pay the costs of the application.

Saturday,
Nov. 21st.

The KING *against* The Inhabitants of ST. MARGARET'S, LEICESTER.

The statute 51 G. 3. c. 80. extends to parishes where there are three officers only, one of whom acts as churchwarden as well as overseer; and, therefore, an indenture in such a case, signed by two parish officers, one of whom acted in a double capacity, was held to be valid.

TWO justices by their order, removed *Hannah Barker* and her two children from the parish of *St. Margaret's, Leicester*, to the parish of *Foxton* in *Leicestershire*. The sessions on appeal, quashed the order, subject to the opinion of this Court on the following case:

William Barker, the husband of the pauper, had a derivative settlement in the parish of *Foxton*, and was bound apprentice by a parish indenture dated 30th *April*, 1791, to *Richard Warburton* of *Great Wigston*. The indenture witnessed, that *Thomas Chapman* and *Thomas Iliffe*, churchwardens of the parish of *Foxton*, and the
said

said *Thomas Chapman* and *Thomas Coleman*, overseers of the poor of the said parish, do put and place *William Barker*, apprentice, &c. It was duly allowed by two magistrates, but executed by *Thomas Chapman* and *Thomas Coleman* only. The pauper's husband served a sufficient time under it to gain a settlement in *Wigston*, if the indenture were valid. It was admitted, that *Thomas Chapman* and *Thomas Iliffe* were the two churchwardens of *Foxton* at the time when the same *Thomas Chapman* and *Thomas Coleman* were appointed overseers of the poor, and that these persons were the officers of the parish in the year comprehending the 30th *April*, 1791, the day on which the indenture was executed. The question was, Whether the indenture was valid or not?

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The KING
against
The Inhabit-
ants of
ST. MAR-
GARET'S,
LEICESTER.

G. W. Marriott and *Long*, in support of the order of sessions, contended that this case fell within the mischief intended to be remedied by 51 G. 3. c. 80. It is admitted, that if both these persons had been churchwardens as well as overseers, the case would be within the act; then if so, the present case, in which only one of the persons acted in a double capacity, is à fortiori within the statute.

Phillipps and *Franeklin*, contra, referred to the preamble, which states, "that in divers small parishes, two persons only have been annually appointed to act," and speaks of indentures, &c. signed by such two persons: and the enacting clause makes such indentures, &c. valid. The act, therefore, was intended to apply to those parishes only where there are only two parish officers, both of whom act in a double capacity, but
not

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The King
against
The Inhabit-
ants of
St. MAR-
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LEICESTER.

not to parishes where, as in the present case, there are three individuals executing parish offices at once.

ABBOTT C. J. This act of parliament was a remedial act, and ought therefore to receive a liberal construction, and I do not think, that in holding that this case is within it, we put any forced construction upon its provisions. This case is clearly within the mischief of the act, and I think within the fair meaning of the words by which it is remedied. I am therefore of opinion, that the 51 G. 3. c. 80., extends not only to cases where both the parish officers act in a double capacity, but to those also where only one of them is in that situation. The decision of the sessions was therefore right.

BAYLEY J. I am of the same opinion. This act was passed almost immediately after the determination of this Court in *Rex v. All Saints, Derby*.^(a) And there, one only of the officers acted in a double capacity. It was to remedy the inconvenience resulting from that decision that the act was passed: I think it is not a forced construction of it, (when it is admitted that its provisions include the case of a double defect,) to hold that they also extend to the case of a defect in one parish officer only.

HOLROYD J. concurred.

Order of Sessions confirmed.

(a) 13 East, 143.

1818.

The KING *against* The Justices of OXFORDSHIRE.Monday,
Nov. 23d.

W. E. Taunton had obtained a rule nisi for a mandamus to the defendants, to make an order for paying *Mr. George Cecil*, one of the coroners for that county, a certain sum of money out of the county rates, being a compensation, at the rate of 9*d.* per mile, for the several miles travelled by him as coroner *in returning to his usual place of abode*, from taking several inquisitions set forth in his affidavit.

A coroner, under 25 G. 2. c. 29. s. 1., is not entitled to any compensation for the miles travelled by him in returning to his usual place of abode from taking an inquisition.

Jervis and *G. R. Cross* shewed cause. This depends on the construction of the 25 G. 2. c. 29. s. 1., by which a coroner is entitled to be paid "for every mile which he shall be compelled to travel from the usual place of his abode to take an inquisition the sum of nine pence, over and above twenty shillings for the taking of the inquisition." The fair construction of this is, that the coroner has a right only to charge for the miles he travels in going out. This statute was passed sixty-seven years ago, when the sum of 9*d.* per mile was a full compensation for both journeys; and the usage ever since has been conformable to this view of the statute.

W. E. Taunton, *contra*. The object of the statute was to give a full compensation, and the sum of 9*d.* per mile is not sufficient for that purpose. The act enables the coroner to charge for every mile he is compelled to travel to take such inquisition. Now, he is compelled to travel the miles in returning to his place of abode, and he therefore ought to be allowed for them.

Per

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The KING
against
The Justices of
OXFORDSHIRE.

Per Curiam. The words are, that the coroner shall be allowed 9d. per mile *for every mile he is compelled to travel from the place of his abode to take the inquisition.* The two termini are therefore clearly pointed out, and the coroner can only charge for the miles between them. Now, the miles he travels in returning are obviously not *from his usual place of abode*, and therefore there is no pretence for this charge. Besides, at the time of the passing of the act (which is the proper period to be considered), this was an ample compensation.

Rule discharged with costs.

Monday,
Nov. 23d.

The KING *against* GILL and HENRY.

An indictment charged that defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof: Held that the gist of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and not necessary to set out the specific pretences.

THE defendants were found guilty upon an indictment which charged that they unlawfully did conspire and combine together, by divers false pretences, and subtle means and devices, to obtain and acquire to themselves, of and from P. D. and G. D., divers large sums of money of the respective monies of the said P. D. and G. D., and to cheat and defraud them respectively thereof, to the great damage, &c. And being now brought up for judgment,

Gurney moved in arrest of judgment, on the ground that the indictment was framed too generally; that the words, "by divers false pretences and subtle means and devices," gave no information to the defendants of the specific charge against which they were to defend themselves; that the overt acts of conspiracy should be stated, or at least so much of them as to shew the

corpus delicti or transaction to which the charge was meant to be applied; and that in no instance hitherto had so general a count been supported.

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The King
against
Gill.

ABBOTT C. J. The indictment appears to me sufficient. The gist of the offence is the conspiracy: and although the nature of every offence must be laid with reasonable certainty, so as to apprise the defendant of the charge, yet I think that it is sufficiently done by the present indictment. It is objected that the particular means and devices are not stated. It is, however, possible to conceive that persons might meet together, and might determine and resolve that they would, by some trick and device, cheat and defraud another, without having at that time fixed and settled what the particular means and devices should be. Such a meeting and resolution would nevertheless constitute an offence. If, therefore, a case may be reasonably suggested in which the matters here charged would, if there were nothing more, be an offence against the law, it is impossible, as it seems to me, to conclude that the law should require the particular means to be set forth. The offence of conspiracy may be complete, although the particular means are not settled and resolved on at the time of the conspiracy. I think, therefore, that no sufficient ground has been stated for arresting the judgment.

BAYLEY J. I am of the same opinion. When parties have once agreed to cheat a particular person of his monies, although they may not then have fixed on any means for that purpose, the offence of conspiracy is complete. This case appears to me not distinguishable

in

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—
The King
against
Gill.

in principle from the *King v. Eccles* (a), which decided that the means need not be stated; and there *Buller J.* said, "that the means were matter of evidence to prove the charge and not the crime itself." It is therefore not necessary to state the means at all in the indictment, it being quite sufficient to charge the defendants with the illegal conspiracy, which is of itself an indictable offence.

HOLROYD J. I am of the same opinion. The present case differs materially from the case of obtaining money under false pretences. There the false pretences constitute the offence; but here the conspiracy is the offence; and it is quite sufficient to state only the act of conspiring and the object of the conspiracy in the indictment. Here it is stated that the parties did conspire, and that the object was to obtain, by false pretences, money from a particular person. Now, a conspiracy to do that would be indictable, even where the parties had not settled the means to be employed. I therefore think that there is no ground for arresting the judgment.

Rule refused.

(a) Cited in 6 *Term Rep.* 628., and reported in the last edition of *Leach's Crown Law*, 274.

Tuesday,
Nov. 23d.

LEWIS against HAMMOND.

Where a turn-
pike act ex-
empted persons
from toll "in
going to and
returning from

ASSUMPSIT, for money had and received, money paid, and on an account stated. Plea, general issue. The cause was tried before *Holroyd J.*, at the last assizes. Held that the word "parochial" extended over the whole clause; and therefore that a Dissenter was not within the exemption in going to and returning from his proper place of religious worship, situate out of the parish in which he resided.

sizes

sizes for the county of *Wilts*, and a verdict was found for the plaintiffs, damages 10*d.* and costs 40*s.*, subject to the opinion of the Court, upon the following case :

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Lewis
against
HAMMOND.

By an act of the 37 G. 3., there was directed to be taken at the several turnpikes erected by virtue of that act, the toll of 5*d.*, for every horse drawing any carriage, with the usual power of distress in case of non-payment. The act contained a proviso, that no toll should be demanded or taken for the passage of any person or persons residing in any township or parish in which the roads lay, going to and returning from their proper parochial church, chapel, or other place of religious worship, on *Sundays*, or attending the funeral of any person or persons that should die and be buried in the same parish. The plaintiff was and had been for a long period, an inhabitant of *Rowde*, one of the parishes in which the roads mentioned in the act lay, where there was a parish church. During all that time, he had been a member of a congregation of protestant dissenters, whose place of religious worship was at *Devizes*, and a regular attendant at, and contributor to, such place of religious worship, *which was found by the jury to be his proper place of religious worship*. On Sunday, 20th April, the plaintiff, with his family, went in a taxed cart drawn by two horses, from his house at *Rowde*, to the meeting-house at *Devizes*, for the purpose of attending, and did attend the celebration of divine worship there. He went thither by the direct road, and returned direct to his own house, and in so doing passed through a turnpike gate in the parish of *Rowde*, being one of the turnpike gates erected by virtue of the act. The meeting-house was in the parish of *St. Mary, Devizes*,
and

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against
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and there were two intervening parishes between that parish and the parish of *Rowde*. The defendant was the collector of the toll at the gate, and demanded the sum of 10*d.* for the passage of the plaintiff in his cart. The plaintiff stated the place, and the purpose to and for which he was going, and claimed to be exempted from the payment of toll, under the proviso in the act. The defendant refused to permit the plaintiff to pass without payment of the toll, and the plaintiff, to avoid the distress which was threatened, paid 10*d.*, which was so demanded.

This case was argued on a former day in this term, by *Gaselee* for the plaintiff, and *C. F. Williams*, for the defendant. The Court went so fully into the question in giving judgment, that it became unnecessary to state the arguments; and now,

ABBOTT C. J. delivered the judgment of the Court. This case was very well argued before us, in the course of the present term. By the body of the act the toll is imposed generally; the party who declines to pay it, must therefore bring himself within the terms of the exception; but we are of opinion that the plaintiff has not been able to do so. The early parts of the clause of exemption are not framed with such perspicuity as to aid the construction of the latter part, upon which this question has arisen. That part is as follows; "nor for any person or persons residing in any township or parish, in which the said roads lie, going to and returning from their proper parochial church, chapel, or other place of religious worship on *Sundays*." This exception does not extend generally to all persons going to or returning from a place of religious worship,

worship, nor even to all persons going to or returning from their proper place of religious worship; for it is obvious, that a person of the same religious persuasion as the plaintiff, and who should be a member of a dissenting congregation, assembling at a place situate in one of the parishes in which these roads lie, but who should reside out of any of those parishes, would not be entitled to the benefit of the exemption. It is obvious also, that members of the Church of *England*, residing in one of the parishes, who should resort to a church in another parish, either ordinarily, by reason of its more near and convenient situation, or at extraordinary seasons, when the church of their own parish might happen to be under repair, would not be entitled to the exemption; because such persons would not be going to their proper church. And this appears to us to shew, that the words "chapel or other place of religious worship," which follow the word church, are to be understood of places of the same kind as church, which is first mentioned. It is not denied that they are to be so understood, as far as regards the first epithet "proper," that is, that they are to be understood of places of assembly, of which the parties resorting to them are quodammodo members. And we think they are so to be understood also, with reference to the epithet "parochial," and that this word is to be applied in construction, not to the word church only, but also to the following words, "chapel or other place of religious worship," as denoting the situation of such chapel or other place, with reference to the residence of the persons frequenting it. This construction is also aided by the consideration of convenience. The gate-keeper may be expected to inform himself as to the persons

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 LEWIS
 against
 HAMMOND

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against
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residing in his parish, the places of worship situate within it, and the hours of usual attendance at them, but he cannot be expected to acquire such information, as to other and more distant places: and unless we are right in our construction of the clause, there will be no limit to the distance of the place, except such as the practicability of travelling to it may impose. The extensive limits therefore contended for by the plaintiff, may occasion much uncertainty and confusion, and much dispute and wrangling, on a day that ought to be specially devoted to charity and peace. For these reasons, we are of opinion, that the plaintiff is not entitled to recover: and the *postea* must be delivered to the defendant, that a nonsuit may be entered.

Judgment for Defendant.

Tuesday,
Nov. 24th.

BEDFORD *against* DEAKIN, BICKLEY, and HICKMAN.

Where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills: Held that the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking under these circumstances the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt.

ASSUMPSIT by the plaintiff as indorsee against the defendants, as drawers of the two following bills of exchange: “*May 6th, 1813, Seventy-five days after date, pay to the order of Mr. John Smith, three hundred and forty-eight pounds, value received.*” “*December 7th, 1813, Seventy-five days after date, pay to the order of Mr. Edward Hickman, two hundred and fifty pounds, value received.*” The defendants

Bickley

Bickley and *Hickman* pleaded their bankruptcy, and as to them a nolle prosequi was entered. The defendant *Deakin* pleaded the general issue. The cause came on to be tried at *Westminster*, at the sittings after *Trinity* term, 1817, before Lord *Ellenborough* C. J. when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:

In the year 1813, the three defendants carried on business together in partnership at *Bilston* in the county of *Stafford*, under the firm of *Bickley, Hickman and Co.* and as such partners, they drew the instruments declared upon, on the days they respectively bore date, which were indorsed over to the plaintiff. They were duly presented for payment, and were dishonoured, and the defendants had regular notice of their dishonour. The defendants dissolved their partnership on the 6th day of *February*, 1814, and the plaintiff was aware of this event. In the month of *December* following, the defendant *Bickley*, came to one *Birch* a friend of the plaintiff's and stated, that he wished to make an arrangement with the plaintiff about the two bills in question: that an arrangement had been made amongst the three partners, by which he, *Bickley*, was to provide for these two bills, and requested *Birch* to offer the plaintiff his, *Bickley's*, promissory notes, for the principal and interest due upon them, payable at four, eight, and twelve months, to be indorsed by *George Rushbury* the younger. *Birch* in consequence communicated what had passed between *Bickley* and himself to the plaintiff, who consulted *Birch* about the propriety of taking other securities, saying, he held very good ones already, and he did not wish to prejudice those which he then held. How-

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 BEDFORD
against
DEAKIN.

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BEDFORD
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ever, at last he agreed to take the notes of *Bickley*, reserving strictly the security of the three partners. *Birch* communicated this to *Bickley*, who accordingly on the 27th day of *December*, 1814, gave to the plaintiff three promissory notes bearing date that day, made by himself payable to his own order at Messrs. *Spooner* and Co. bankers, and indorsed by him and the said *George Rushbury* the younger, one for 205*l.* at four months, another for 223*l.* 11*s.* 11*d.* at eight months, and the third for 210*l.* at twelve months, amounting together to the sum of 638*l.* 11*s.* 11*d.*, being the amount of the principal interest and expences on *Bickley*, *Hickman* and Co.'s two bills, and interest on *Bickley's* new notes from the dates thereof, during the time they had to run. The two bills on which the action was brought, remained in the hands of the plaintiff. When the notes for 205*l.* and 223*l.* 11*s.* 11*d.* respectively became due, they were taken up by *Bickley*, by means of other bills indorsed by the plaintiff, and discounted by *Bickley*. These bills were dishonoured and taken up by the plaintiff, and produced nothing to him. There never was any productive payment of the notes for 205*l.* and 223*l.* 11*s.* 11*d.* The note for 210*l.* always remained in the plaintiff's hands, and was never paid, nor did *Bickley* ever give the plaintiff any bills or securities of any sort to cover it. The case then set out parts of a deed dated *December* 13th, 1814, executed by the partners, and *Rushbury*, by which *Bickley* agreed to take certain debts (amongst which were the two bills in question) upon himself, and *Deakin* took other debts upon himself. This was the arrangement which *Bickley* communicated through *Birch* to the plaintiff. *Hickman* became a bank-

rupt on *November* 4th, 1814, and *Bickley* on *July* 27th, 1817.

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Campbell, for the plaintiff. The defendant *Deakin* was originally liable on these bills as a principal debtor, and must still remain so, unless the debt appears to have been satisfied. The plaintiff in this case, though he took new securities from *Bickley*, expressly stated at the time that he considered all the three partners as still liable, and he kept possession of the original bills. Suppose *Deakin* had pleaded that these notes were accepted by *Bedford* in satisfaction, the facts stated, clearly would have negatived that plea; nor will the circumstance that the three notes include interest on the original bills up to the period of the notes becoming due, make any difference, for the utmost that would follow from that would be, that the plaintiff's right of action would be for that period suspended. In *Newmarch v. Clay* (a), the case turned on the application of payments, and there also the original bills had been delivered up, upon which latter circumstance, Lord *Ellenborough* proceeded in his judgement. But that does not exist here: and the same observation applies to *Evans v. Drummond*. (b) *Reed v. White* (c) turns on the particular mode of dealing, and the plaintiffs by their conduct in that case, had enabled the ship's husband to receive money, which he ought not to have received. At all events the plaintiff is entitled to recover to the extent of 210*l.*, for even supposing that the renewal of the two other notes affected the case, there was no renewal of that note by *Bickley*.

(a) 14 *East*, 239.

(b) 4 *Esp.* 89.

(c) 5 *Esp.* 122.

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Gaselee, contra. The plaintiff, in this case, had a full knowledge that the agreement between *Bickley* and *Deakin* was, that the former should pay this debt; for this was communicated to him by *Birch*. He then takes from *Bickley* three notes, to the amount of the debt and interest; and afterwards, in the absence of *Deakin*, gives time to *Bickley* on all the notes, and even successively renews two out of the three. After that, he must be taken to have accepted the securities given by *Bickley*, one of the partners, as a satisfaction for the original debt due by all of them; and that, on the authorities of *Reed v. White*, and *Evans v. Drummond*, will entitle *Deakin* to the judgment of the Court. All that *Deakin* could look to was the conduct of the plaintiff; and from the circumstances stated, and the length of time elapsed, he might naturally conclude the whole was settled. And the giving time to *Bickley* by the plaintiff was sufficient to exonerate him. [Abbott C. J. Can it be contended that *Deakin* could, under the deed stated in the case, have demanded that the plaintiff should sue *Bickley* on these bills? In the case of principal and surety the latter may do so. And if, therefore, the creditor have, by giving time to the principal, disabled himself from complying with the surety's demand, the latter is discharged. That is the foundation of the rule which was originally established in equity: but that does not apply to a case like this.] In *English v. Darley* (a), and *Gould v. Robson* (b), it was held, that taking a fresh security from the acceptor of a bill discharged the indorsers; and yet, in those cases, the holder expressly reserved his right, and retained the

(a) 2 Bos. & Pull. 61.

(b) 8 East, 576.

original

original bills. At any rate, the defendant ought to be liable only to the amount of 210*l*.; for the successive renewals of the other notes must surely exonerate him as to those. Whatever reservation the plaintiff might at first have made, still it does not appear that he made any at the times when the notes first given were renewed.

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Campbell, in reply, was stopped by the Court.

ABBOTT C. J. I think that the plaintiff is entitled to recover his whole demand from *Deakin*. In this case, all the defendants were jointly liable on the original bills; and therefore it is very different from the cases cited of different parties on a bill of exchange, where, by the form of the instrument, they are not all jointly liable, but have remedies over against each other. But it is urged, that in this case, the defendants entered into an agreement by deed, by which one of them, *Bickley*, undertook to discharge the bills in question; that this was communicated to the plaintiff, through *Birch*; and that the acceptance by him of the new securities from *Bickley*, under this agreement, discharged *Deakin* from his original liability. But how does the fact stand? On the circumstances being communicated to the plaintiff by *Birch*, he refused to assent at first to the agreement, saying that he already held very good securities, and that he did not wish to prejudice them; and when at last he agreed to take *Bickley's* notes, he did so, *reserving strictly the security of the three partners*. It cannot, therefore, be reasonably said that the plaintiff ever agreed to take *Bickley's* notes as a satisfaction for his claim upon the original bills. But it is then argued

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that

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that the renewal of the two notes operated as a discharge pro tanto of *Deakin*, inasmuch as the plaintiff had no right to do that without *Deakin*'s knowledge, it being a detriment to him, by preventing him from having recourse to his remedy against *Bickley* on the agreement. Whether this was done without the actual knowledge of *Deakin* I cannot say, the case being silent on the point. But undoubtedly he had legal knowledge of it; for he knew that the original bills had not been delivered up by the plaintiff, and that till that happened he remained liable upon them. It was therefore his duty to have made the necessary inquiries. The utmost that the plaintiff has done, in this case, has been to consent to further the agreement between the partners by endeavouring, if possible, to get payment of the original bills from *Bickley*. He has endeavoured to do this, and has failed; and he has therefore a right now to resort to his claim against *Deakin*, who was originally liable.

BAYLEY J. In this case, all the three partners originally were jointly liable to this debt; and no arrangement between themselves can vary the right of the creditor. That right, however, may be destroyed by the creditor consenting to accept of the separate security of one partner in discharge of the joint debt, and that is the foundation of the decision in the two cases cited from *Espinasse's* Reports; but there is no such consent here. The three notes which the plaintiff took from *Bickley* (two of which have been successively renewed, but one not), cannot amount to a satisfaction of the joint debt; unless, first, they were, when taken by the plaintiff, intended by him as a satisfaction for it; or unless, secondly, the
con-

conduct of the plaintiff has, without the fault of *Deakin*, produced mischief to him. As to the first point, it is quite sufficient to say that the plaintiff expressly reserved his claim against all three upon the joint debt. And as to the second, if *Deakin* was, by the successive renewals of the bills, lulled into security, it was his own fault; for, being a joint debtor with *Bickley*, it was his duty, for his own security, to see that the debt was paid. And the test of that was easy; for, if *Bickley* had paid the debt, he must have had the original bills to produce; and *Deakin*, therefore, if *Bickley* did not produce them, ought to have concluded that the debt had not been paid. The plaintiff, therefore, is entitled to recover.

HOLROYD J. I am of the same opinion. The dishonour of the original bills gave a right of action against all the three partners: and the circumstance of a creditor giving time to one of three joint debtors, will not discharge the others; nor even, strictly speaking, suspend his right of action against them. I think that the giving of the three notes by *Bickley* will not operate as a satisfaction of the joint debt: for, in the first place, it is not a satisfaction of a higher nature; and, in the second place, there was an express reservation of the plaintiff's claim against all the three. And the agreement between the three partners cannot vary the plaintiff's right, even though it was communicated to him. I think, therefore, that the plaintiff is entitled to recover the whole amount of his claim against *Deakin*.

Judgment for the plaintiff.

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Wednesday,
Nov. 25th.

WELLS *against* COOKE.

Where the parties named two arbitrators, who were to choose an umpire, and each arbitrator named a person to whom the other objected; and they afterwards agreed to decide by lot which should name the umpire, and thereupon the party who won, named the person to whom the other had previously objected: Held that the award made by such umpire was bad.

PARKE moved to set aside the award in this case on the ground that the umpire was improperly appointed. It appeared that the submission was to two persons, and if they disagreed, to an umpire to be chosen by them: the arbitrator selected by the plaintiff nominated a person to whom the arbitrator on the part of the defendant objected, and after several proposals made on each side, the arbitrators not agreeing, it was determined by them that they should draw lots which arbitrator should have the nomination, and the lot falling on the plaintiff's arbitrator, he nominated the person who had been objected to, who made his umpirage in due time. Both the arbitrators and the parties attended before the umpire. In support of the application he cited *Harris v. Mitchell* (a), and *Neale v. Ledger* (b), where Lord *Ellenborough* is reported to have said that a tossing up between the two arbitrators which should nominate the umpire in exclusion of the other was bad.

Scarlett shewed cause, and relied on the subsequent conduct of the parties in attending the umpire. But as it did not appear by the affidavits that the defendant or his attorney had any knowledge of the mode in which the umpire had been appointed, *the Court* made the

Rule absolute.

(a) 2 *Vern.* 485.

(b) 16 *East*, 51.

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Ex parte VOGEL, in the Matter of EHRENSTROM,
a Bankrupt.

Friday,
Nov. 27th.

SCARLETT had obtained a writ of habeas corpus directed to the keeper of *Newgate*, commanding him to bring up the body of *Levi Vogel* for the purpose of being discharged. The warrant of commitment, when returned, stated that a commission, dated 12th November 1818, had duly issued against *Eric Ehrenstrom*, on which he had been declared a bankrupt; and that *Vogel* was suspected to have concealed and secretly disposed of a part of the goods and estate of the bankrupt; and was duly summoned to appear, and did appear before the commissioners; and that *Vogel* being duly sworn, the commissioners caused the following questions to be propounded to him, to which he gave the following answers. *Quest.* Do you know, and how long time have you known, the bankrupt? *Ans.* I have known him about nine or twelve months. *Quest.* Upon what occasion did your connexion commence in business? *Ans.* I cannot tell unless I have my papers. *Quest.* Have you had many dealings with the bankrupt, and to a large amount? *Ans.* I have had various dealings with him to the amount of 2000*l.* *Quest.* Do you keep regular books of account in which all

Commissioners of bankrupt are authorized to examine a witness concerning the person, trade, dealings, estate and effects, of the bankrupt, and incidentally to this power they may examine him also respecting other individuals, through whom they may be likely to obtain information on those points. And, therefore, where a witness was asked questions as to when and where he last saw the bankrupt's wife: Held that such questions were legal and material; and that the commissioners were justified in committing him for giving unsatisfactory answers to these questions. Held also, that

the true criterion by which to judge as to the propriety of the commitment was to consider all the questions and answers collectively, and then to say whether the whole examination was satisfactory or not; and, therefore, where the commissioners in their warrant set out several questions, to some of which, taken alone, the answers were satisfactory, held also, that this was no objection to a warrant committing the party "till he should full answer make to the questions so put to him as aforesaid."

your

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your transactions with the bankrupt will appear? *Ans.* Yes, I do. *Quest.* What was the nature of your dealings with the bankrupt? *Ans.* I bought various parcels of goods from the bankrupt, and paid for them; and the bankrupt now owes me money. *Quest.* If your only transactions with the bankrupt have been buying goods of him for which you have paid, how can the bankrupt owe any money to you? *Ans.* The bankrupt asked me about the beginning of *November* to lend him 300*l.*, and I lent him 295*l.*, for which I have no bill or memorandum; I believe I have not: whether I have a letter acknowledging it I cannot tell; but I have no other security. *Quest.* Do you claim to prove this debt under this commission, or not? *Ans.* At the present moment, not. *Quest.* At what place was the advance of 295*l.* made to the bankrupt? *Ans.* At his country house. *Quest.* Who was present at the time? *Ans.* I do not recollect. *Quest.* Was any body? *Ans.* I do not recollect. *Quest.* Have you lent money to the bankrupt upon any other occasion? *Ans.* I do not recollect. *Quest.* When did you lend him the sum last mentioned? *Ans.* I cannot say exactly: it was in the beginning of *November*. *Quest.* Do you not know it was on the evening before he absconded? *Ans.* I cannot say exactly. *Quest.* Did he not tell you he wanted that money for the purpose of going abroad? *Ans.* No, he did not, as far as I recollect. *Quest.* Will you swear positively he did not tell you he wanted that money for the purpose of going abroad? *Ans.* I will swear positively as far as I have any recollection, that he did not tell me. *Question repeated.* *Ans.* I cannot answer any thing else to the purpose: I do not say that I will not swear positively. *Quest.*

Quest. Do you say that you will swear positively?

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Ans. So far as I can recollect, I can swear positively that he did not tell me. *Quest.* When did you first

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hear the bankrupt had absconded? *Ans.* I do not re-

collect. *Quest.* How long before the bankrupt had

absconded did you see him? *Ans.* I don't know when

he went. *Quest.* When did you last see him? *Ans.*

My head is so much confused I cannot answer any

questions. *Quest.* When did you last see his wife?

Ans. I cannot say exactly when. *Quest.* Have you not

seen her since the bankrupt absconded? *Ans.* I

do not recollect exactly, I might or I might not.

Quest. State as far as you can when you last saw her?

Ans. I cannot say exactly what time it was, or when it

was; I think about a fortnight ago. *Quest.* Where

did you see her? *Ans.* I saw her at a house.

Quest. Where was that house? *Ans.* I do not know

the street. *Quest.* Whose house was it? *Ans.* It was

not my house; I do not know whose house it was.

Quest. How did you find out where she was? *Ans.* I

do not remember. *Quest.* Have you no further answer

to give to the commissioners upon the last question,

which is repeated? *Ans.* I do not remember how I

found it out, at the present moment I do not recollect

who brought me there, or how I came there; I dare

say I could find out; how I came to the house. — The

warrant then stated, that these answers not being

satisfactory to the commissioners, *Vogel* was accord-

ingly committed by them to *Newgate*, "until such time

as he shall submit himself to the commissioners, and

full answer make to their satisfaction, to the questions

so put to him as aforesaid."

Scarlett,

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Scarlett, Gurney, Montagu, and F. Pollock, for the prisoner, contended that the commitment was bad, and that the prisoner was entitled to his discharge. The commissioners have a power by 5 G. 2. c. 30 s. 16. to examine witnesses concerning the "person, trade, dealings, estate, and effects of a bankrupt," and the point is, whether the questions and answers stated in the warrant have relation all of them to those subjects. They may be divided into three classes: the first of which relates to the dealings between the witness and the bankrupt. On this subject the commissioners had authority to enquire, but then there is nothing unsatisfactory in the answers. The second class of questions relates to a sum of money due to the witness from the bankrupt. Now that was hardly within the scope of the authority of the commissioners: for it was a debt due from the bankrupt; and the witness, who was the creditor, did not at that time, claim to prove the debt under the commission. But, even supposing that the commissioners were authorised to make the enquiry, the answers are satisfactory enough considering the nature of the subject-matter. If the commissioners had wished for further information, they ought to have given the witness time to have brought his books and papers for that purpose. The last class of questions in the warrant relates to an interview of the witness with the bankrupt's wife. Now, even if it be admitted that some of these have been unsatisfactorily answered, still as the whole of the enquiry on this point was irrelevant, and beyond the scope of the commissioners' authority they had no right to commit him, for any answers, whether satisfactory or not, given to such questions. The warrant is therefore clearly bad, inasmuch as all the ques-

tions which the commissioners had authority to ask have been satisfactorily answered. But there is another ground on which it is bad: if any question be improper, or being proper has been satisfactorily answered, the commissioners have still no authority to commit the witness till he shall full answer make *to the questions so put to him as aforesaid*: for then he is committed till he shall answer all the questions, or in other words till he shall answer not only the questions which the commissioners had a right to put, but also those which were irrelevant and improper. The warrant therefore (which is entire) is bad for this reason. In support of that point they cited *Ex parte James (a)*, *Rex v. Nathan (b)*, and an anonymous case from *Barnardiston. (c)* This defect is not cured by the 18th section of 5 G. 2. c. 30. for it is one not of form, but of substance, *Ex parte Cassidy (d)*, *Coomb's case. (e)*

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Voxl.

Topping and *Curwood*, contra, contended that the real question was, whether these were all *lawful* questions: and they clearly were so. The only doubt attempted to be raised on the other side, is as to those questions relating to the bankrupt's wife, which it is said were irrelevant. Now it is well known that the wife may be examined concerning the estate, a part of which this witness was suspected of concealing. It is therefore abundantly obvious that these questions might be very relevant as laying the foundation of other enquiries which the commissioners might afterwards make. But if it were doubtful, the Court will of course give the commissioners credit for not asking idle and unne-

(a) 1 P. Wms. 611.

(b) 2 Stran. 880.

(c) 1 Barnard. 398.

(d) 2 Rose, 220.

(e) 2 Rose, 400.

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cessary questions, *Ex parte Bland*. (a) In the case *Ex parte James*, one of the questions was *illegal*, which makes the whole difference. And as to the answers, no one exercising a sound judgment on the subject can for a moment doubt that they were most unsatisfactory, *Ex parte Nowlan*. (b)

They were then stopped by the Court.

ABBOTT C. J. When this writ was moved for, the learned counsel who made the application, relied principally on the latter part of the examination, which contained the questions as to the time when, and the place where the prisoner last saw the wife of the bankrupt. It struck me at the time, that that might possibly turn out to be an inquiry wholly immaterial; and the Court the more readily granted the writ, because this power of commissioners of bankrupts is an extraordinary one, and ought to be carefully watched. On the discussion of the case, however, I am quite satisfied, that it is the duty of the Court to remand the prisoner. If our decision is erroneous, it is still competent for him to apply either to the Lord Chancellor, or to any of the other courts in *Westminster Hall*, to obtain his liberation. It appears, by the warrant, that he was brought before the commissioners under suspicion of having concealed or assisted in concealing the effects of the bankrupt. That was the object of the enquiry, which no doubt the commissioners had full authority to pursue, and to examine all persons touching either the person, trade, dealings, estate, or effects of the bankrupt. Now it seems to me, that an enquiry having this object in view, may

(a) 1 Atk. 205.

(b) 6 Term Rep. 118. Cooke, B. L. 130.

be very properly conducted, by asking the person under examination, both when and where he last saw the bankrupt, and when and where he last saw the bankrupt's wife. If indeed, in answer to these questions, he had said, that the communications which he had had with either the one or the other, had no relation whatever either to the person, trade, dealings, estate, or effects of the bankrupt, and that they were merely of a private and confidential nature, it perhaps might vary the case. I do not say what, under such circumstances, it would be the duty of the commissioners to do. It is enough, that those circumstances do not exist here; and I think that sufficient appears on the face of the warrant to shew, that the enquiry here was both lawful and material, being in fact the foundation of ulterior enquiries, as to what had become of the estate and effects of the bankrupt in this case. If so, it follows that all the questions here stated, were both lawful and material. Then are the answers satisfactory? Taking them all together, I think they are unsatisfactory. An answer to one particular question, may be either satisfactory or not, according as it bears upon other questions propounded to the witness. And the only way, therefore, to come to a proper conclusion, is to look at all the questions and answers collectively, and to consider them as constituting one entire examination. Now, on looking at these answers in that manner, I think that they were unsatisfactory, and that the commissioners did right to commit the party. The Court, therefore, must remand him, till he shall give such answers to these questions, as, taken collectively, shall reasonably satisfy the commissioners.

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BAYLEY J. I am of the same opinion. I accede to all the principles laid down by my Lord C. J., and my opinion is founded on the words of the act of parliament. From them it appears, that the subject of the enquiry before the commissioners, was clearly within their jurisdiction; that the questions in this case were pertinent, and that the answers were unsatisfactory. The act authorizes the commissioners to examine third persons as to the person, trade, dealings, estate and effects of the bankrupt; and, with a view to that enquiry, they may put all lawful questions. If, however, they commit the party for not answering them, they are bound to specify upon the warrant, the questions so put and the answers given. And if there be any defect in form in the warrant, the Court have a power to amend it, and to commit the party, if they see that all lawful questions have not been duly answered, till that shall have been done. If, then, this warrant had been erroneous, in committing the party till he should answer *all the questions* satisfactorily, I should think that a defect in form, and that the Court might amend the warrant, and recommit the party, till he should make satisfactory answers to *all the material questions*. It is to be observed, that these questions had reference to circumstances which had occurred very recently before the examination, and the answers given, plainly shewed, that the party was evading the questions put to him, and that he did not speak the truth, when he said that he had no distinct recollection as to the transactions between him and the bankrupt. Besides, the facts which transpired as to the debt of 295*l.* afford strong grounds for suspecting that that sum had been advanced by him, for the purpose of enabling the
bank-

bankrupt to go abroad, and that there was property secreted for the purpose of covering the advance. I think, therefore, that the commissioners were justified in coming to the conclusion, that these answers were unsatisfactory; and that they would not have discharged their duty, if they had not committed the party. The prisoner must therefore be remanded.

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HOLROYD J. I was not present in court during the whole of this argument, but upon the discussion which I have heard, I am of opinion, that the commissioners in this case have acted within the scope of their authority. By the warrant, it appears that their enquiries related to the estate, dealings, and person of the bankrupt. It is however alleged, that this did not authorize them to put any questions with regard to the bankrupt's wife. But I apprehend that the commissioners have a right to put questions respecting other persons, through whom they may be likely to obtain information of the estate, dealings, and person of the bankrupt. For it may be extremely material in a case where a person suspected of having concealed part of the property is brought before them, and gives evasive answers to questions on this subject, that the commissioners, who are aware that the bankrupt has absconded, should require of such a person, to state what communications he has had with the wife of the bankrupt, and when and where they took place. I think, therefore, that the questions here put were legal and material. The Court is not to presume that the commissioners have put any illegal question, unless that clearly appears to be so on the face of the warrant. If the questions be illegal, the party should demur to them before the commissioners, but he has not done

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so here, for he has answered the questions which are apparently legal, and his answers are not satisfactory. With respect to the point which has been made, that some at least of these questions have been satisfactorily answered, and that therefore the warrant is bad, I fully agree with my Lord C.J. in thinking, that if, taking the whole examination together, the answers collectively appear unsatisfactory, the commitment is legal. That being my opinion, I think that the prisoner must be remanded.

ABBOTT C. J. I wish to add, that I do not by any means think the power vested in commissioners of bankrupts too great. It is not too great for the purpose of detecting those frauds which are too generally practised. And as far as my knowledge and experience enable me to judge, I believe that it has almost invariably been exercised with great caution and discretion.

The prisoner was remanded.

Saturday,
Nov. 28th.

The KING *against* The Justices of WORCESTER-SHIRE.

The 13 G. 3. c. 78. s. 62. is applicable to proceedings by order of two justices under 55 G. 3. c. 68. s. 2. Held, therefore, that it is necessary to give reasonable notice of the special sessions at which any such order is to be made to the several justices acting and residing within the division; and that unless such notices be given the sessions ought not to confirm and enrol such order, even though there be no appeal against it.

W. E. Taunton had obtained a rule nisi, for a mandamus to the justices for the county of *Worcester*, commanding them to confirm an order made by two justices, for diverting and turning a footway, pursuant to the statute 55 G. 3. c. 68. From the affidavits, it appeared that the orders had been made by two justices, at a special sessions, holden on

Tuesday,

Tuesday, the 15th *September*, the precept for which had been issued by them to the high constable on the *Saturday* preceding, and the notices of which were given by the constable to the justices acting for, and residing within the division in which the footway was situate, only on the preceding *Monday*; that after the order was made, the several notices prescribed by the 55 G. 3. c. 68. s. 2., were duly given; that at the subsequent quarter sessions the order was returned to the clerk of the peace in open court, and application made that it might be confirmed and inrolled, there being no appeal against it; but that the sessions had refused to grant the motion, on the ground that sufficient notice of the time and place of holding the special sessions had not been given to the justices of the limits within which the footway was situate.

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Russell now shewed cause. The sessions have exercised a sound discretion in refusing to confirm this order. Although there was no appeal, still they might inquire whether it was made under the authority of 55 G. 3. c. 68. s. 2. That clause contains the word “confirm,” which necessarily implies some previous inquiry. Then if so, they have exercised the power properly in this instance; for the special sessions was not convened after reasonable notice. And the authorities which may be cited to shew that a sessions may be holden without notice, apply only to a quarter sessions, general sessions, or petty sessions, which are holden by the justices, under the authority of their general commission, and not to a special sessions, which is one holden on a special occasion, for the execution of some particular branch of their authority (a), and

(a) 2 Hawk. P. C. c. 8. s. 18. edit. 1795.

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which must therefore conform to the directions of the statutes which authorize it. The authority here is derived from the statutes 55 G. 3. c. 68. s. 2. and 13 G. 3. c. 78. s. 62., which last expressly requires notice to be given of the time and place of holding a special sessions, to the several justices acting and residing within the limits. Notice was therefore necessary, and the sessions rightly decided, that a notice given to the justices of the division only the day before, was not a reasonable notice. Then the special sessions not being properly convened, the order made there was not sufficient.

Peake and Taunton, in support of the rule. There was no appeal in this case, and the sessions had no power to enquire further than whether the order appeared upon the face of it to have been made by two justices at a special session, and whether the notices of such order, as required by 55 G. 3. c. 68. s. 2., were duly given. The statute enacts, that, the notices of the order having been published, the order shall be confirmed and inrolled at the quarter sessions, unless there be an appeal; and the form of the notice given in the schedule to the act concludes by stating, "that the said order will, at the said quarter sessions, be confirmed and inrolled, unless, upon an appeal against the same to be then made, it be otherwise determined." So that where there is no appeal, the legislature intended that they should confirm the order of justices, if upon the face of it it appeared to be regular. But supposing the sessions to have the power of inquiring whether the order was made at a special sessions properly instituted, yet here they have come to a wrong conclusion. For no notice was necessary,

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inasmuch as the justices may hold a sessions, without any notice; and a special session is nothing more than a special sitting of justices, not necessarily requiring notice more than any other sessions. This order is made solely under the 55 G. 3. c. 68. s. 2., which requires that the justices shall make the order "at some special sessions," and says nothing about notice; and as that statute repealed the 13 G. 3. c. 78. s. 19., and substituted other provisions in lieu of it, it gave a power of holding a special sessions for this purpose, entirely independent of the 13 G. 3. c. 78. s. 62. Besides, by the 55 G. 3. c. 68. s. 2., *any two* justices may make the order, at some special sessions, though many justices be present, so that the presence of the other justices would not be attended with any beneficial effect. [*Abbott C. J.* Have you any authority to shew, that if five magistrates were assembled at a special sessions, two of them might make an order against the opinion of the other three?"] Though there is not any authority upon this point, the words of the 55 G. 3. c. 68. s. 2., seem to admit of such a construction. But even if it were necessary to give notice, then the notice given on the day before was sufficient, for the 13 G. 3. c. 78. s. 62. does not specify any particular time for it.

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ABBOTT C. J. I am of opinion that the sessions have properly refused to confirm this order. They can only be required to confirm an order, which has been made conformably to the authority given by the 55 G. 3. c. 68. s. 2.; and it was therefore a proper subject of inquiry, whether the special sessions, at which the order was made, was properly convened; because if it was not so convened, the order was made without lawful authority. This leads to the second subject for

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consideration, namely, whether it was necessary to give notice of the special sessions to the justices of the limit or division, and whether the notice which appears to have been given, was sufficient. Upon this point it has been argued, that the 19th section of the 13 G. 3. c. 78., being repealed by the 55 G. 3. c. 68., the other provisions of the former statute will not apply to an order of justices, for diverting and turning a road, made under the authority of the 55 G. 3. c. 68. s. 2.; but I think the 62d section of the 13 G. 3. c. 78. is an existing provision, applicable to a proceeding by order of two justices, at a special sessions, under the 55 G. 3. c. 68. s. 2. The latter statute recites the former, and incorporates many at least of its provisions; and it enacts, that the justices, by their order, may divert and turn the ways therein mentioned, "by such ways and means, and subject to such exceptions and conditions, in all respects, as in the said recited act mentioned, with regard to highways to be widened or diverted." The statute thus referred to expressly provides, by the 62d section, that the justices may hold a special sessions for the purpose of that act, causing notice to be given of the time and place of holding such special sessions, to the several justices acting and residing within the limits; and I think, therefore, that upon the proper construction of these acts, taken together, it was necessary, in the present case, to give notice of the special sessions to the justices of the division. With respect to the notice which was given, I am clearly of opinion, that it was not sufficient; I do not lay down any precise rule as to the time of notice, which is not prescribed by the statute, but there must be reasonable notice, and the notice in the present case was not reasonable. I think, therefore, that the order

was not one which the justices at their sessions ought to have confirmed, and that in refusing to confirm it, they properly watched over the interest of the public. The rule therefore must be discharged: and (as the application is against magistrates) must be discharged with costs.

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BAYLEY J. I commend highly the conduct of the sessions in refusing to confirm this order, and cannot help saying that there was a greater degree of haste on the part of the justices who made the order, than was quite proper. With respect to the inquiry made by the sessions, as to the order being valid, there can be no doubt but that they had a right to enquire whether the order presented to them, though there was no appeal against it, was made by proper authority, before they proceeded to confirm it. Upon the point of notice, I do not think that any occasional sitting of two magistrates is a special sessions, within the meaning of the statutes relating to this subject. A special sessions here means, a sitting convened by notice to the other magistrates of the division; and I think that, taking 55 G. 3. c. 68. s. 2, and the 13 G. 3. c. 78. s. 62. together, it is clear, that the legislature meant that a special sessions for this purpose, viz. for diverting and turning a way, should only be holden after notice to the justices of the division. A reasonable notice is therefore necessary; and I think the notice in the present case was not reasonable; that the order being made without a proper notice, was not an efficient order; and that the sessions acted very properly in refusing to confirm it.

HOLROYD J. I am of the same opinion. The sessions were right in refusing to confirm an order which
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was not made under proper authority. There can be no doubt that there ought to have been reasonable notice of the special sessions in this case, to the justices of the division, according to the 13 G. 3. c. 78. s. 62. For though the statute 55 G. 3. c. 68. repeals a particular section of the 13 G. 3. c. 78., yet it substitutes other provisions in lieu of it; and these provisions are, I think, clearly subject to the 62d section of the 13 G. 3. c. 78., which is not repealed. This order, therefore, having been made without such reasonable notice, was not properly made; and the rule calling upon the justices at their next quarter sessions to confirm it must be discharged.

Rule discharged with Costs.

Saturday,
Nov. 28th.

LUNTLEY *against* BATTINE.

Where the question of privilege from arrest is doubtful, the Court will not, upon motion, discharge the party out of custody, but leave him to his writ of privilege.

Quære, Whether a gentleman of the king's privy chamber be privileged from arrest.

A RULE nisi had been obtained, for discharging the defendant out of custody; as being a gentleman of the king's privy chamber. It appeared from the affidavits on the part of the defendant, that in *March*, 1812, he was appointed by the Lord Chamberlain, and admitted into the place and quality of a gentleman of his Majesty's most honourable privy chamber in ordinary; that since his appointment he had been daily liable to be called on to attend his Majesty on different state occasions, *personally* and not *by deputy*; that it was part of the duty of these gentlemen to attend the sovereign on marriages of the royal family, unless solemnized privately, and also on the public entries of ambassadors; and that they did in fact attend at the marriage of the present Queen Dowager of *Wirtemberg*, and on a public entry of an ambassador about

twelve years ago, by order of the then Lord Chamberlain; and that in the event of the demise of any of the crowned heads of this country their attendance would probably be required. (a) On the part of the plaintiff, the affidavits stated that the number of gentlemen of the privy chamber were about forty; that they had no salary or profit whatever; that they were never called upon to perform any services of a domestic nature in the household, nor were they considered as forming any part of his Majesty's domestic establishment; that the only occasions on which they were called upon to give their personal attendance on his Majesty were great state occasions, as the king's coronation, or the public marriage of any of the royal family, or the reception of ambassadors, when received by his Majesty in state, and that such attendance was considered as merely honorary and only intended to increase the number of his Majesty's retinue; that since the year 1797 only one instance had occurred in which they were required to attend his majesty and that the defendant himself, since his appointment, had not been called upon to perform any duty in respect of his office.

Lawes and *Chitty* now shewed cause. The privilege from arrest is the privilege of the king and not of the servant; and the reason assigned for this privilege by Lord *Coke* (b), is in these words "concerning those that serve the king in his household, their continual service and attendance upon the royal person of the king is necessary." Here the attendance of the defendant has not been required during the six years he has held the office. He has no duties of a domestic

(a) It seems that on these occasions the attendance of all is not required; six of them only attended the Venetian Ambassador in 1763.

(b) 3 Inst. 631.

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nature to perform, and therefore cannot he said to serve the king in his household; he is neither, therefore, within the reason of the privilege or the description of persons entitled to it. The exemption from serving certain offices, and on juries, inquests, watch or ward, expressly given to the king's servants by proclamation, on the accession of his Majesty, is confined to servants in ordinary with fee (*a*); and the reason of such exemption is thereby declared to be *in regard of their attendance on the king's person*. The defendant clearly could not claim the benefit of that exemption; and as the ground of the exemption must in both cases be the same, it would seem to follow that he is not entitled to privilege from arrest. In *Bartlett v. Hebbs* (*b*), and *King v. Foster* (*c*), the parties were domestic servants of the king. In *Barrington v. Venables* (*d*), the Court of K. B. decided that a gentleman of the privy chamber was liable to be sued in this Court: and from *Pegge's Curialia* (*e*), it appears that the gentlemen of the privy chamber at the present day are not in the habit of attending the king's person.

Scarlett and Marryat contra. This privilege is not confined to the king's domestic servants, but equally extends to those who are necessary to support the splendour of the sovereign; and although a personal privilege, yet it is analogous to the local privilege incident to a palace. Lord Coke (*f*) states that privilege to belong to "all the king's palaces wherein his royal person resideth," yet *Kensington* palace having for years been kept in a proper state of preparation to

(a) *Pegge's Curialia*, 76.

(b) 5 *Term Rep.* 686.

(c) 2 *Taunt.* 167.

(d) 1 *Keb.* 137.

(e) P. 47.

(f) 3 *Inst.* 140.

receive

receive his majesty, with his officers, servants, and guards residing and doing duty there, although he in fact never personally resided there, was held to be a privileged place. The defendant holds an office, in respect of which he is bound at any time when called upon to perform certain duties which are considered necessary to support the splendour of royalty; and it appears upon the affidavits, that occasions may occur when his attendance may be required; this therefore falls within the principle established in the case of *Winter v. Miles*. (a) And *Rex v. Moulton* (b) is an express authority to shew that a gentleman of the privy-chamber is privileged from arrest.

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ABBOTT C. J. I thought this a plain case at first in favour of the privilege claimed, but on hearing the whole argument, I am now of opinion, that it is not so free from doubt as I had at first supposed. The form of the proclamation referred to in the course of the argument, shews that the privileges there enumerated are confined to his majesty's servants in ordinary *with fee*. It is true that that proclamation is not applicable in all its terms to the present case, but it furnishes a ground for a distinction which may be taken between servants with and without fee. If the privilege exists, it is for the benefit of the crown and not of the individual, and although the Court certainly have in some instances discharged defendants claiming privilege on motion, it will be found on examination, that those were cases where there was no doubt as to the existence of the privilege claimed. And in *Bartlett v. Hebbes*, where the question was, whether the defendant should be discharged on motion, or put to

(a) 2 Feb. 3.

(b) 10 East, 578.

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sue out his writ of privilege, Lord *Kenyon* says, “with respect to the mode of application, it was finally settled in *Pitt’s* case (*a*), that a person entitled to privilege might be discharged on motion; and although that is discretionary in the Court under the circumstances, as where there is any doubt whether the party applying be really such a person as is entitled to the privilege or other unfavourable and suspicious circumstances, yet here it being admitted that the defendant is a servant of the king, there is no ground for refusing to discharge him on motion.” It appears, therefore, from this authority, that if there be a doubt on the case, the Court will not discharge him on motion, but leave him to sue out his writ of privilege, and in *Pitt’s* case, one reason given for it is, that the writ, if sued out, may contain suggestions which might be traversed by the other side, and so the matter be determined on record. As there is, therefore, no great necessity for the service of these officers, the occasions being but rare when they are called upon, and when they occur, not requiring the attendance of them all, I do not think that any inconvenience will result to his majesty’s service, by our leaving the defendant to sue out his writ of privilege, in order that the point may be solemnly determined upon record. The rule must therefore be discharged.

BAYLEY and HOLROYD, Js. concurred.

Rule discharged. (*b*)

(*a*) 2 *Str.* 985.

(*b*) The gentlemen of the privy chamber formerly were in constant attendance on the royal person, in the privy chamber. They were likewise employed in confidential offices without doors, as occasion required. They had wages and diet, livery from the wardrobe, and herbigage for their horses, both in town and country. In the *Liber Niger Domus regis Angliæ* (*temp. Edw. 4.*), they are styled esquires of the household and their duties are described to be, that they be attendant

attendant on the king's person in riding and going at all times; that they help to serve his table; and that none of them depart the court without licence. In the statutes made at *Eltham*, for the regulation of the household, (1526), they are mentioned by their modern name, and part of their duty is described to be, that six wait at a time to be ready at the king's rising, to apparel his highness, putting on such garment in reverend, discreet, and sober manner, as it shall please his highness to wear; and two of them are nightly to lie on the pallet within the king's privy chamber. From the household ordinances of king *Charles* First and *Charles* Second, their duties appear to have continued the same, and in the latter reign, their attendance appears to have been very close, although they had no salaries subsequent to the reign of *James* the First. In that of *James* the Second they were deprived of their only remaining privilege, that of diet, and about the same time, their domestic duties are supposed to have ceased. Since the accession of the house of *Hanover*, their attendance has not been required, except at a coronation, the entry of the *Venetian* ambassador (who on the accession of a new sovereign, usually came in state, and was received accordingly); the funeral of the king or queen; and once at the revival of the Order of the Bath in 1726, when the procession of the knights attending the king to the chapel royal, on *Easter Sunday*, was led by gentlemen of the privy chamber. See *Pegge's Curialia*, Dissertation on the original nature and duty of the Gentlemen of the Privy Chamber.

It seems, therefore, that whatever might have been the duties of these gentlemen formerly, that they now no longer serve the king in his household, nor is their continued service and attendance on his royal person necessary: they do not, therefore, come within the reason assigned for this privilege in the third Institute, or within the description of persons who are there stated to be entitled to it; and it is observable that the form of appointment varies substantially from that anciently in use. The modern form, is in general terms, "to have, &c. the said place, with all rights, profits, privileges, and advantages thereunto belonging, in as full and ample manner as any gentleman of his majesty's most honourable privy chamber, doth hold or hath held or enjoyed, or of right ought to hold and enjoy the same." In the ancient form, the rights and privileges were specifically described, and in that set out in the *Curialia*, p. 46., as being the form used in the reign of *Charles* the Second, it is stated that "his person is not to be arrested without leave first had or obtained, neither is he to bear any public office, nor to be impaneled on any inquest or jury, nor to be warned to serve at the assizes or sessions, whereby he may pretend excuse to neglect his majesty's service. See the proclamation referred to in the course of the argument, issued on the accession of his present majesty to the throne, *Curialia*, p. 77. In that proclamation, after reciting therein, that his predecessors had signified their pleasure, that his servants should have and enjoy all ancient privileges, his majesty thinking it reasonable that all his servants in ordinary with fee, should, in regard of their constant attendance upon his majesty's person, enjoy the like privileges with those of his predecessors, ordered that the lord chamber-

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chamberlain and other officers therein mentioned should signify to all mayors, sheriffs, &c. of corporations and counties, that his servants should have their ancient privileges, and that henceforward, none of the *servants in ordinary with fee*, should bear any public offices, serve on juries or inquests, watch or ward." It is remarkable that this proclamation, by which the privileges therein mentioned are confined to servants in ordinary with fee, does not mention the privilege from arrest.

REGULA GENERALIS.

IT IS ORDERED, That from and after the last day of this present term, no rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded upon an affidavit of merits, or (if made on the part of the sheriff, or bail, or any officer of the sheriff) be grounded upon an affidavit, shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff (as the case may be) at his or their own expence and for his or their only indemnity, and without collusion with the original defendant.

By the Court.

END OF MICHAELMAS TERM.

C A S E S

1819.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Fifty-ninth Year of the Reign of GEORGE III.

MEMORANDA.

IN the course of the vacation, *William Draper Best*, one of His Majesty's Serjeants learned in the law and Chief Justice of *Chester*, was appointed one of the Judges of this Court. And

John Richardson, Esq. of the *Middle Temple*, having been first called to the degree of Serjeant at Law, was appointed one of the Judges of the Court of Common Pleas. He gave rings with this motto : "*More majorum.*"

Mr. Serjeant *Copley* was appointed to the office of Chief Justice of *Chester*. And

On the first day of this term, the following gentlemen took their seats within the bar :

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As King's Serjeants,

Mr. Serjeant *Pell*.Mr. Serjeant *Copley*.

As King's Counsel,

Giffin Wilson, of *Lincoln's Inn*, Esq.*Michael Nolan*, of *Lincoln's Inn*, Esq.*Stephen Gaselee*, of *Gray's Inn*, Esq. And*Robert Matthew Casberd*, of the *Middle Temple*, Esq.as having a patent of precedence to rank next after Mr. *Gaselee*.HELPS and Wife *against* HEREFORD and Others.

Where husband and wife granted to trustees an estate, of which the wife's father was seised in fee-simple, and afterwards, in the life of the father, they levied a fine of the lands to the uses of the settlement, and the father afterwards died, leaving the wife one of the co-heiresses: Held that her moiety of the estate became subject to the uses of that settlement, by reason of the fine, as an estoppel against the husband and wife and all persons claiming title under them.

THE following case was sent by the Vice Chancellor, for the opinion of this Court.

By articles of agreement, dated 8th of *September*, 1775, between *Thomas Quick*, of the first part, and *Anne Carpenter*, one of the daughters and co-heiresses of *Thomas Carpenter*, deceased, of the second part, and Sir *J. H. Knight*, and *J. H. Esquire*, of the third part; after reciting that a marriage was intended to be solemnized between the said *T. Q.* and *A. C.*, and that the said *A. C.* was seized of, or entitled in her own right, to one moiety of certain freehold lands, &c. situate in the county of *Hereford*, and also entitled to the undivided moiety of certain other lands, &c. situate in the parish of *Weobly* or elsewhere in that county, which were the estate of the said *T. C.* her father, it was agreed that all the said estates should within twelve months after the marriage, be conveyed to Sir *J. H. Knt.* and *J. H. Esq.*, their heirs, &c. as trustees upon certain trusts therein mentioned. By inden-

indentures of lease and release dated 2d and 3d of September, 1776, being a settlement after the marriage, *Thomas Quick* and *Anne* his wife, conveyed to the above trustees and their heirs, the undivided moiety in divers hereditaments amongst which were particularly set out and described certain estates situated at *Broxwood* in the county of *Hereford*. The hereditaments comprised in this settlement were of three descriptions, first, estates vested in *Anne Quick* in fee-simple, secondly, estates vested in her father *Thomas Carpenter*, as tenant in tail under his father's will, with remainder over, and of which he was then in possession, and thirdly, the estates at *Broxwood* above described, which were vested in *Thomas Carpenter* in fee-simple, and of which he was then also in possession. In *Michaelmas* term, 1777, *Thomas Quick* and *Anne* his wife, levied a fine to the trustees of the premises at *Broxwood*, with warranty against themselves and their respective heirs. By an indenture dated 6th of *November*, 1777 endorsed on the settlement, and reciting that the marriage was solemnized before the execution of the settlement *which made it necessary that the said Anne Quick, should have levied a fine of the freehold hereditaments and premises therein contained, to have enabled her to join in the conveyance thereof to the use of the settlement, which omission had been then lately discovered, and that she had as of then Michaelmas term, joined with her husband in levying a fine or fines thereof to the trustees, it was witnessed, declared, and agreed between all the parties to the said indenture. and more particularly by Thomas Quick and Anne his wife, that such fine or fines so levied by them should be, and were intended to be, and were to the use of the said trustees by way of cor-*

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roboration, and confirming unto them and their heirs the conveyance of such part of the premises as were freehold to the several and respective uses in the said settlement limited, of the same and *for no other purpose whatsoever*. *Thomas Carpenter* (who had in the first articles of agreement been stated falsely as deceased) afterwards died seized of the estates at *Brorwood* in the month of *November* in the year 1782, leaving *Ann Quick* and *Hannah Carpenter*, his only children and co-heiresses at law; and *Anne Quick* then became seized of, or entitled to one moiety thereof, as one of the said co-heiresses. The question for the opinion of the Court was, whether the moiety of the farm and lands at *Brorwood*, which Mr. and Mrs. *Quick* settled by the indentures of the 2d and 3d *September*, 1776, became subject to and bound by the uses of that settlement. The case was argued in last *Michaelmas* term, by

Preston, for the plaintiffs. This case depends on the operation of the fine levied by Mr. and Mrs. *Quick*. It is not competent for them, or any persons claiming under them, to contend, that the estates at *Brorwood* were not, as to the moiety which descended to Mrs. *Quick*, bound by the uses of the settlement of 1776. The fine, according to the authority of all the decided cases, operated by way of estoppel; and estoppel is a rule of justice favoured by a court of equity, as well as courts of law. In *Wright v. Wright* (a), where a person having a contingent interest conveyed to his son, in consideration of natural love and affection, the gift was supported after the interest vested: and Lord *Hard-*

(a) 1 *Ves.* 409.

wicke,

wicke, in giving judgment in favour of the gift, said, "It is such as he may bind himself. In law, the heir may levy a fine of lands in the life of the ancestor, which will bind by estoppel after descent to him. So there is a method of conveying, that is, preventing a claim against it; and so here he may release." So in *Whitfield v. Fausset* (a) a fine had been levied, of a rent charge, while in contingency, and the Lord Chancellor there observed, "the rent-charge might never arise at all; or if it did, the two sons, at the death of the mother, might not be heirs of the body to take it. If they had died in the life of the mother without issue, the rent had been gone; if they had left issue, other persons would be entitled to take it by purchase. Nothing passed, therefore, by that conveyance, in point of law, *it being by deed and no fine; which if it had been levied of this rent, and they had survived their mother, as against them, it would have operated by estoppel, binding them and their heirs.*" In *Sheppard's Touchstone* (b), the effect of a fine is thus stated, "either it passeth all the right and interest of the conusor to the conusee, or else it worketh by way of extinguishment and estoppel, and doth perpetually bar the conusor and his heirs of all present and future right and possibility of right or other collateral benefit to the thing whereof the fine is levied." The same law is to be found in *Vick v. Edwards* (c), and *Co. Litt.* (d) And in *Edwards v. Rogers* (e), although the judgment of the Court was ultimately against the estoppel, yet it was admitted by all the judges, that a fine had that operation, whenever the heir derived title to the estate, from the person who

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(a) 1 Ves. 387.

(b) P. 6.

(c) 3 P. Wms. 372.

(d) P. 352. a.

(e) Sir Wm. Jones, 456.

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had levied the fine by which the estoppel was created. The case of *Goodtitle v. Morse* (a), turned on the nature of the instrument. It was a surrender of copyhold lands, and a surrender cannot operate by estoppel; but Lord *Kenyon* admitted, "that a fine differs from the case of a surrender, for the fine will be good against the heir by estoppel, although it passes no estate at all: but if a surrender be not good, there will be no estoppel." And it was upon that point that the case was decided. These authorities, therefore, shew, that the fine in this case operates by way of estoppel against Mr. and Mrs. *Quick*, and all persons claiming under them, and therefore that the moiety of the lands at *Broxwood*, which descended to Mrs. *Quick*, became bound by the uses of the settlement of 1776.

Sugden, contra. The cases which have been cited, do not afford any express decision upon the point, but only contain dicta of the different judges on this subject, and it is to be observed, those were all cases of contingent rights, where the party levying the fine had some interest; but here, the party who levied the fine had no interest whatever at the time in the lands at *Broxwood*. In the first agreement stated in the case, the parties recite the death of the father, which was not the fact; and yet the agreement proceeds upon that ground, and is an agreement not to settle a specific estate, but any estate which *Anne Carpenter* might have: then follow the indentures of lease and release, executed after the marriage, which contain three descriptions of property. Now as to some of these, that deed certainly had an effect, but it had no

(a) 3 Term Rep. 369.

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operation whatever, upon the estates at *Broxwood*, which were in the possession of the father in fee-simple at that time. Then in *Michaelmas* term following, the fine was levied; subsequently to which there is another instrument executed, which recites the reasons why that fine was levied, and the parties do not say that they meant it to operate upon the lands then in the possession of the father, but only that in consequence of the marriage having preceded the settlement, it became necessary for the wife to have levied a fine to have enabled her to join in that conveyance. It was done, therefore, to supply this defect, and to give effect to the settlement as to the freehold property then belonging to the wife, but it had no reference whatever to the lands then in possession of the father; and to hold that it operated on them by way of estoppel, would be to counteract the plain intention of the parties, and would be productive of great inconvenience. Besides, every estoppel must be reciprocal, in order to be good; but here, supposing that the father had, subsequently to the fine, conveyed his estates to the trustees, they would have taken these estates by that conveyance. And so the estoppel would not have been reciprocal. *Co. Litt.* (a) He also cited *Litt.* sect. 701. *Edward Seymour's* case (b), and *Doe v. Whitehead.* (c)

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Preston, in reply, contended, that this estoppel was reciprocal; and that even if the conveyance from the father had taken place, the trustees were bound by the estoppel, and must have held the land subject to the uses of the settlement.

(a) 352. a.

(b) 10 Rep. 95. b.

(c) Dougl. 45.

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against
Hawtorn.*

The following certificate was afterwards sent.

This case has been argued by counsel, and we have considered it; and are of opinion, that the moiety of the farm and lands at *Broxwood*, which Mr. and Mrs. *Quick*, settled by the indentures of the 2d and 3d of *September*, 1776, became subject to and bound by the uses of that settlement.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

**MILES STRINGER *against* WILLIAM MURRAY
and Others.**

Where *A.*, having contracted for a ship to be built for him in the *East Indies*, agreed during the time of the building to sell a share to *B.*, and *B.* paid a part of the price in pursuance of the agreement; and afterwards, on the ship's arrival in *England*, *A.* caused her to be registered, and accounted with *B.* as part-owner; but *B.*'s name was never on the register as part-owner: Held that *B.* had no legal interest in the ship.

IN the year 1811, *Thomas Garland Murray*, had contracted with certain ship-builders at *Calcutta* in *India*, for a ship to be built by them on his account, and intended to be employed in the *East India Company's* service. While the ship was building at *Calcutta*, *T. G. Murray* entered into a verbal agreement with the plaintiff, through his agent *Richard Stewart* for the sale of a sixteenth share of the ship to the plaintiff, who at the request of *Murray*, signed a written acceptance of the purchase in which the ship was described to be building at *Bombay*, and on the 28th *December*, 1811, *Stewart*, by desire of the plaintiff, sent the written acceptance to *T. G. Murray* enclosed in a letter, of which the following is an extract. "I enclose you Mr. *Stringer's* acceptance of the share of the new ship building at *Bombay*, which I have obtained of him agreeable to your request." *T. G. Murray* on the same day

day wrote and sent to *Stewart* the following answer. "I have just received your letter of this date, accompanying one from Mr. *Stringer*, in which both yourself and that gentleman appear mistaken, as the ship I am building is at *Calcutta* and not at *Bombay*; I cannot now name any precise sum the one-sixteenth share will amount to, but certainly 3000*l.* at least, and I propose leaving the account open until the ship's arrival, when the estimated value of her can be distinctly ascertained, and if any balance shall appear due upon that share, it must then be paid; a proportion of that sum I shall call for at six or nine months. I think you had better make Mr. *Stringer* acquainted with the substance of this letter, and if it be not giving him too much trouble, I should wish him to rectify the mistake in his note I have mentioned." *Stewart* soon after receiving the last letter, communicated the same to the plaintiff: he agreed to rectify the mistake. And on the 7th of *May*, 1812, in part-performance of the contract on his part, paid to *T. G. Murray* 1500*l.*, on account of the one-sixteenth share of the ship, and *Murray* then gave him the following receipt: "Received of *Miles Stringer*, Esq. the sum of one thousand five hundred pounds, on account of one-sixteenth share of a ship building for me, at *Calcutta*." And in further pursuance of the contract, the plaintiff on the 26th *December*, 1812, paid to *T. G. Murray*, the further sum of 1500*l.* on account of the one-sixteenth share of the said ship, but did not take any receipt for the same. The ship having been completed, was delivered by the builders to the agent of *T. G. Murray*, in the month of *January*, 1813, and

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named the *Castle Huntly*, and *John Paterson* was appointed to the command; and in the latter part of the year 1813, the ship arrived in the river *Thames*. On the 16th of *November*, 1813, the ship, on the oaths of the said *T. G. Murray*, and *J. Paterson*, (who had purchased three-eighths of the ship,) was, without the privity or consent of the plaintiff, registered by them in the port of *London* by the name of the *Castle Huntly*; and in the registry, *T. G. Murray* and *J. Paterson* were stated to be the owners thereof. On the 10th *February*, 1814, *T. G. Murray* sold and assigned one-eighth share of the ship to *W. Sims* and *Jacob Sims*, an entry of which sale was duly made at the custom-house of *London*, and the proper indorsement made upon the ship's certificate of registry. When the plaintiff was made acquainted with the form in which the ship was registered, he applied to *T. G. Murray*, and requested him to execute a bill of sale of the one-sixteenth share, and to make to him a perfect legal title thereto, but the same was not done. On the 26th *April*, 1816, *T. G. Murray* transmitted to the plaintiff an account purporting to be an account of the plaintiff's one-sixteenth share of the ship, and of the plaintiff's debts and credits in respect thereof. On the 28th of *July*, 1816, *T. G. Murray* died without having executed any bill of sale to the plaintiff, having made his will, and having appointed as executors *William Murray*, and the other defendants, who have duly proved the same. On the 27th day of *July*, 1816, *T. G. Murray* executed a bill of sale by way of mortgage, to *W. Murray*, of one moiety of the ship, for securing to him the payment of 15000*l.* of which bill of sale an entry was made

made at the proper office of the custom-house of *London* on the 30th of the same month, and on the 23d of *May*, 1817, an indorsement was made upon the certificate of the ship's registry by the defendant *W. Murray*, as executor of *T. G. Murray*, to the same *W. Murray*, in his own right, the ship having been at sea at the time of the execution of the bill of sale, and the indorsement being made within ten days after her return.

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The question directed by the Lord Chancellor to be sent for the opinion of the Court was, whether the plaintiff had any, and what legal interest in the ship called the *Castle Huntly*.

Richardson, for plaintiff. The property in this ship being originally in the builders, passed from them, on their delivering it in the *East Indics*, to the agent of *T. G. Murray*, and then vested in him, and the other persons whom he had admitted to participate with him in this chattel, as tenants in common. The possession of one, therefore, was the possession of all, *ex parte Flynn (a)*, and the delivery to one, was a delivery to all. The ship-builder must, therefore, be considered as having delivered the ship to *Stringer* and *Murray*. It may be said, that the price was not ascertained; but that is not always necessary to pass the property in a chattel. It is only so, in cases where, in order to pass the property, a delivery is required; but the parties here being tenants in common, the property was in all, and no delivery was necessary. Here, if the ship had been lost on her voyage home, the loss must have fallen upon the

(a) 1 *Atk.* 185.

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parties interested, who were *T. G. Murray* and the plaintiff. But in this case, there is an actual part-payment of the price, and that is allowed in account, and the plaintiff is therefore actually treated as a part-owner; the ship is delivered, and then employed on their joint account; and then in fraud of this, *Murray* causes the ship to be registered in his own name and that of *Paterson*. But if the property had once vested in the plaintiff, by the delivery in the *East Indies*, the subsequent unauthorized registration cannot affect his rights. The register acts do not apply to ships built in the *East Indies*, for the provisions of those acts are there incapable of execution; there being no custom-house officers to do the several acts required by those statutes. The statute of *William* only applies to the *West Indies*. The 26 G. 3. c. 60. does not extend to such a case, because a ship could not be registered in the *East Indies*, in the manner required by that act. The 55 G. 3. c. 116., which was passed long after the transaction in question, for the first time provides for the registration of ships in the *East Indies*; the register acts must therefore be considered as containing a virtual exception of all vessels from the operation of those acts, so long as their requisites could not be complied with; and he referred to the case of *Tulloch v. Bruce*, in the *Cockpit*, in 1810, where this very point was made.

Tindal, for defendants. There was no sufficient sale in this case to convey to the plaintiff the legal interest in the sixteenth share. The matter rested in agreement only, and was executory. It was merely an agreement to sell at a future time, viz. when the ship should be completed. It was not, therefore, an actual sale, by which

which the legal interest in the thing sold, passed to the vendee. Where a thing sold is in existence, and in the possession of the seller, and the sale is made by words of present contract, and the price paid, the legal property shall pass in the thing sold, although there be no actual delivery; *Noy's Maxims*, c. 42., and *Hebart* (a); but a contract may be either executed, as if *A.* agrees to change horses with *B.*, and they do it immediately, in which case the possession and the right are transferred together; or it may be executory, as if they agree to exchange next week; here, the right only vests, and their reciprocal property in each other's horse is not in possession, but in action; for a contract executed, which differs nothing from a grant, conveys a chose in possession, a contract executory conveys only a chose in action; 2 *Black. Comm.* (b) Here the contract was executory; the ship was, in 1811, building at *Calcutta*, on account of *Murray*, by his order, and under his contract; there was nothing then in existence, upon which the contract could operate, to give a legal property; all the materials were not even purchased, and the price was not even to be fixed until the ship was finished. The words in the receipt "the ship now building for me," shew that a future transfer of the share was contemplated; until the ship was delivered to *Murray's* agent, it rested only in contract in himself; he had no legal interest to give; *Mucklow v. Mangles* (c); and if so, it is impossible to contend, that he could convey any. Supposing the plaintiff had a legal interest, at what period did it commence? when the ship was partly built; and did it extend to the materials purchased from time to time? The fair in-

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(a) 41.

(b) 442.

(c) 1 *Taunt.* 318.

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ference to be drawn from the facts stated, is, that the substance of the contract was, that when the ship was completed, the plaintiff should have the legal title of one-sixteenth conveyed to him. At all events, however, where there has been a contract incomplete for want of delivery, and a second sale of the same thing, accompanied with delivery, the second shall be preferred to the first. *Domat's Civil Law*, book 1. tit. 2. s. 3. art. 13. And here, it is to be observed, the plaintiff has done nothing to get his title completed; the mortgagee has done every thing. But secondly, it is against the policy of the register acts to allow the legal title of the ship, when completed, to pass by such executory agreement. These acts do apply to ships built in *India*. The 7 & 8 W. 3. c. 22., is confined to the ships of the built of *England, Ireland, or the colonies or plantations in Africa, Asia, and America*, belonging to his majesty, or which shall hereafter be in the possession of his majesty, his heirs or successors." It might perhaps be doubtful, whether the *East India* settlements were included within the restrictive description of *Colonies or Plantations*, used in this act; particularly as, by the 12 G. 3. c. 54. s. 3., "the United Company are *allowed* to build, or contract for the building of any ships in *India*, or in any of his majesty's colonies in *America*, for their service." And it is enacted, "that all such last-mentioned ships, which shall be so built, shall, to all intents, be deemed to be *British ships*." This question, however, arises on the 26 G. 3. c. 60. s. 1., by which, all the privileges or advantages shall hereafter be confined to such ships only as are wholly of the built of *Great Britain or Ireland, Guernsey, or of some of the colonies, plantations, or territories,*

in *Asia*, *Africa*, or *America*, which now belong, or at the time of building such ship or vessel did belong, or may hereafter belong to or be in possession of his majesty, his heirs or successors." The question therefore is, whether *Calcutta* in the *East Indies* is within the territories in *Asia* belonging to his majesty. The *East Indian* possessions in the following statutes are termed "territorial acquisitions:" The 13 G. 3. c. 63. the 19 G. 3. c. 61., the 20 G. 3. c. 56., the 21 G. 3. c. 65. ss. 8. & 39. In the 24 G. 3. sess. 2. c. 25., which passed only two years before the register act, they are stiled in the title of the act, the *British* possessions in *India*, and in the first section the territorial possessions of this kingdom in the *East Indies*. In the 33 G. 3. c. 52. they are called the *British* territories in *India*. The 37 G. 3. c. 117. is quite decisive to shew that the trade to the *East Indies* is considered by the legislature as a trade to territories and possessions belonging to his majesty within the meaning of the navigation laws; it is intitled "An act for regulating the trade to be carried on with the *British* possessions in *India* by the ships of nations in amity with his majesty." It begins by reciting the navigation act, 12 Car. 2., and then recites "That it would be expedient that ships of countries in amity with his majesty should be allowed to import goods and commodities to, and export them from the *British* territories in *India*; and it then proceeds to enact, that they may do so notwithstanding the act of Car. 2. The 53 G. 3. c. 155. enacts "that the territorial acquisitions in *India* shall remain in the possession of the Company, without prejudice to the sovereignty of the Crown of the United Kingdom of *Great Britain and Ireland* in and over the same." It is clear, there-

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therefore that the legislature have considered the *East India* Company's possessions in *India* as territories belonging to his majesty; and if so, they fall within the meaning of the navigation laws. Indeed it was a generally received opinion that under the 7 & 8 *W. 3.* ships built in *India* were entitled to a register, and it was even held that *Surat* was a plantation or colony within the meaning of that stat., so as to entitle a ship there built to have a plantation register, *Reeves's Law of Shipping*, p. 97. There are also decided cases in the courts of law, in which it has been held, that the *East Indies* were affected by the navigation laws. In *Morck v. Abel* (a) an insurance upon a *Danish* ship, which was laden at *Calcutta* for *Copenhagen*, was held to be illegal, as in contravention of the 12 *Car. 2.*, and in *Chalmers v. Bell* (b) a ship was insured from her loading port in the *East Indies* to *Gottenburgh*, and it appearing that part of her lading was taken on board in a *British* port in the *East Indies*; the voyage was held to be illegal, and the insurance void. Then, if the *East Indian* possessions fall within the navigation act, they also fall within the 26 *G. 3.* in which the same words are used; and if the register acts apply to this case, it is against their policy to allow any person, whose name does not appear upon the register, to have a legal interest in the ship; *Camden v. Anderson* (c), and *Curtis v. Perry* (d), are authorities to shew that the register is conclusive evidence as to the legal title where the ship has once passed by bill of sale. And the ownership must be evidenced by the register, and the register alone, *Mestaer v. Gillespie* (e)

(a) 3 *Bos. & Pull.* 35.(c) 3 *Term Rep.* 709.(e) 11 *Ves. jun.* 621.(b) *Ib.* 604.(d) 6 *Ves. jun.* 739.

and

and *Ex parte Yallop*.^(a) But if the argument on the other side were to prevail, the register would not be evidence of ownership in all cases; this would form an exception; and an exception, too, that would let in all the mischief contemplated by the legislature.

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Richardson, in reply. The property vested *not* when the ship was bespoke, but when the delivery took place; and that being a delivery to one of several tenants in common, vested the property in all: *Stringer*, therefore, might have maintained trover against a wrong-doer. [*Bayley J.* There was no payment of the whole price. The delivery here was by a man who knew nothing of the plaintiff, to another who also knew nothing of the plaintiff. *Holroyd J.* If this were a constructive delivery to the plaintiff, then *Murray's* lien for the price was gone.] There is no necessity for a lien for the price between tenants in common; and the mere leaving the possession with the vendor will not enable him to give a title to a second purchaser. By the law of *England* (whatever the rule may be in the civil law), a first sale is not avoided except by fraud. Secondly, It is immaterial to this question whether the *East Indies* are to be considered as territories belonging to his majesty; the question is, whether the register-acts apply to ships built in *India*: if the requisites of those acts cannot be there complied with, the legislature could not have intended that they should include *East-India* built ships. It is clear that they cannot be complied with; and therefore a register was unnecessary.

Cur. adv. vult.

(a) 15 *Ves. jun.* 60;

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The following certificate was afterwards sent :

We have heard this case argued by counsel, and have considered it, and are of opinion that the plaintiff had not any legal interest in the ship called the *Castle Huntly*.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

Saturday,
Jan. 23d.

BULLOCK against DODDS.

By the word *transportation* in the 8 G. 3. c. 15. is meant not merely the conveying of the felon to the place of transportation, but his being so conveyed and remaining there during the term for which he is ordered to be transported ; and therefore a felon attainted is not by that statute restored to his civil rights till after the expiration of the term for which he is ordered to be so transported.

2dly, By attainer all the personal property and rights of action in re-

spect of property accruing to the party attainted, either before or after attainer, are vested in the crown without office found ; and therefore attainer may be well-pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainer.

DECLARATION by the plaintiff, as indorsee, against the defendant, as payee of a bill of exchange, bearing date the 10th *July*, 1809. Plea first, non-assumpsit ; secondly, the statute of limitations ; and thirdly, that at the *Old Bailey* sessions, on the 16th *September*, 1807, the plaintiff was tried upon an indictment, (which was set out in the plea,) and duly convicted of felony ; and that it was by the Court considered, that the plaintiff should be hanged by the neck until he should be dead ; that his majesty, having been pleased to extend his royal mercy to the plaintiff, on condition of his being *transported* to *New South Wales* for life ; which being duly signified to the Court, by the secretary of state, it was further considered, that the plaintiff should be *transported* to *New South Wales*, pursuant to the statute in such case made and provided ; and concluding in bar to the action. The fourth plea did not

differ

differ materially from the third. Replication, after taking issue upon the two first pleas, that before the cause of action accrued, the plaintiff was in due manner *transported* to *New South Wales*, in execution of the judgment. Rejoinder, that after the plaintiff was so *transported*, he was unlawfully at large in *England*. Surrejoinder, that before the cause of action accrued, his majesty had, by his commission, under the great seal of *Great Britain*, given authority to the governor of *New South Wales*, by an instrument in writing, under the seal of the government of the territory, or as he should think fit or convenient for his majesty's service, to remit either absolutely or conditionally the whole or any part of the term for which persons convicted of felony or other offences should be transported; and that before the exhibiting of the bill, the governor of *New South Wales* did, by a certain instrument in writing, under the seal of the territory, absolutely remit the remainder of the term or time which was then to come of the original sentence, or order of transportation mentioned in the plea; by virtue of which instrument, he was lawfully at large; and concluding with a traverse of the allegation, that he was unlawfully at large. The defendant, after craving oyer of the instrument in writing, which was set out verbatim on the record, demurred to the surrejoinder, and the plaintiff joined in demurrer.

This case was argued at the sittings in *Serjeants' Inn*, before *Michaelmas* term, by *Manning*, for the defendant, in support of the demurrer, and *F. Pollock*, contra. There were several objections taken to these pleadings, but the only one upon which the opinion of the Court was there delivered, and upon which it is necessary to state the arguments here, was upon an objection to the replication.

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It was argued for the defendant, that as the plea shewed the plaintiff to be a felon convict, the replication stating only, that he had been *transported* in execution of the judgment, was no answer; for although a commutation of transportation for death operated as a statute pardon, that was only so after the period of transportation had expired; which was not the case here, inasmuch as the plaintiff was transported for life. The pardon pleaded was on condition of plaintiff's being transported; and by the 8 G. 3. c. 15. such transportation is to have the effect of a pardon under the great seal; but that term, as there used, must mean not the mere act of being conveyed to the place of transportation, but the completion of the term of punishment. The statute 18 Eliz. c. 7. s. 3. repeals the old mode of trial by purgation, and enacts, that after clergy allowed, and burning in the hand, the party convicted shall forthwith be enlarged and delivered out of prison, and under that statute it has been held, that the burning in the hand has the same effect in clearing away the disabilities of conviction, as the old mode of purgation had; and it is therefore considered as in the nature of a statute pardon. Yet it has been expressly decided, that a person convicted of felony is not restored to his competency until that punishment be inflicted, or until a pardon under the great seal has been obtained; *Earl of Warwick's case* (a): for letters under the king's sign manual cannot be pleaded as a pardon, *Gully's case*. (b) Here the intended punishment of transportation *for life* has not been suffered, nor has any such pardon been obtained. The 4 G. 1. c. 11 s. 4., which is a statute upon the same subject, expressly enacts, that where any offender

(a) 5 How, *State Trials*, 166.(b) *Leach, Crown Law*, 99.
shall

shall be transported, and shall have served their respective terms, such *services* shall have the effect of a pardon to all intents and purposes.

On the other hand it was argued for the plaintiff, that under 8 G. 3. c. 15. transportation operated as an absolute pardon, at the instant the party convicted arrived in *New South Wales*. If it were only a conditional pardon, it either would never operate at all until the term of transportation had expired, or it would operate until defeated, by the party being at large within the term; if it does not operate at all until the term is expired, this absurd consequence would follow, that a person transported for seven or fourteen years, who died before the expiration of his term, would derive no benefit from the pardon, in relation to his civil rights, so as even to enable him to sue in the courts there, and thus a person transported for life could never derive any benefit whatever; indeed in that case it would be a pardon to a dead man. If it be said, that the pardon is absolute in the first instance, but liable to be defeated by a breach of the condition on which it was granted, the answer is, that such does not appear to have been the intention of the legislature; for the statute expressly enacts, that such transportation shall have the effect of a pardon under the great seal; and then, in the very next sentence, the possibility of the offender's being at large within the term is contemplated. The statute does not, however, then render void the pardon, which was the subject of the former sentence, but makes the being at large within the term a distinct, substantive offence, punishable with death.

After an interval of some days, the opinion of the Court was delivered at *Serjeants' Inn*, by

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BAYLEY J.

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BAYLEY J. There are two questions in this case, one on the merits, viz. whether transportation amounts to a pardon, so as to restore the party to all his rights and capacities, the other, whether the facts should have been pleaded in bar, or in disability of the person only. The pressure of the argument on the first question turns first, on the 8 G. 3. c. 15., and on its application to this case; and secondly, on the meaning of the term transportation as there used, which involves the consideration, whether that statute is complied with, by the mere act of carrying over the offender to the place specified, or by his being carried over and remaining there for the whole period of his sentence. Now upon looking over the several statutes applicable to this subject, it seems quite clear that the mere carrying of the person to the place of transportation was not what was contemplated by that act of parliament; but that his being carried over, and remaining there for the period of his sentence, is what was meant by the term transportation as there used. The first act of parliament upon this subject is the 18 Car. 2. c. 3. s. 2., by which it is enacted, "that it may be lawful for the justices of assize, and commissioners of oyer and terminer, or gaol delivery, before whom the offenders mentioned in that act shall be convicted, to transport or cause to be transported the said offenders into *America*, there to remain and not to return." The 22 Car. 2. c. 5. s. 4. gives the judges of the court before whom the offenders there mentioned shall be arraigned and condemned, a power, "at their discretion, to grant a reprieve, and to cause the offender to be transported beyond the seas, there to remain for the space of seven years, to be accounted from the time of such transportation; and if he

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should

should refuse to be transported, or after such transportation return within the time, then that he should be put to execution upon the judgment so given against him;" and by the 22 & 23 *Car. 2. c. 7. s. 4.* it is enacted, that "in case any person or persons who shall be convict or attainted of any of the offences made felony by virtue of that act, shall to avoid judgment of death, or execution thereupon for such his offence, make his election to be transported beyond the seas, to any of his majesty's plantations; that then the justices of assize, oyer and terminer, gaol delivery, or justices of the peace, before whom such offender shall be convict or attaind by virtue of that act, and every of them respectively, shall cause judgment to be entered against every such offender, that he be transported beyond the seas to some of his majesty's plantations, in the said judgment to be particularly mentioned and expressed, there to remain for the space of seven years; and that, in pursuance of the said judgment, the sheriff or sheriffs of the county or city where such offender shall be convict or attainted, shall cause the said offender to be safely conveyed and embarked to be transported as aforesaid; and if any such offender shall return into the kingdom before the expiration of the said seven years he shall suffer death as a felon, and as if no such election to be transported had been made by him." In these two last acts, there is no fixed and definite meaning attached to the term transportation, inasmuch as it is there used in both the senses now contended for; but it is observable, that under these acts the party returning is to be remitted to and punished under his former sentence, which, therefore, is considered as still subsisting, and in force against him.

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him. Then comes the 4 G. 1. c. 11., which is the great foundation of the law of transportation: in the first section of which it is enacted, that “where any offenders shall hereafter be convicted of any crimes whatever, for which they are by law to be excluded from the benefit of clergy, and his majesty shall be graciously pleased to extend mercy upon condition of transportation to any part of *America*, and such intention of mercy be signified by one of his majesty’s principal secretaries of state, it shall and may be lawful to and for any court having proper authority, to allow such offender the benefit of a pardon under the great seal, and to order and direct him to be transported for the term of fourteen years, in case such condition of transportation shall be general, or else for such other term or terms as shall be made part of such conditions.” So that it appears that in case of capital convictions, the Court have by this act the power to allow the benefit of a pardon under the great seal. Now that pardon must be either conditional or absolute, and in order to ascertain which it is, it will be material to consider, when it is to be considered as commencing. For if it be absolute, it must take effect from the moment of the Court pronouncing the order for transportation; but if it be conditional, it must commence from the expiration of the time mentioned in the act. Now the second section applies only to the case of persons returning into any part of *Great Britain* or *Ireland* before the end of their term, and renders such offenders, and such persons only, liable to be punished as any person attainted of felony without benefit of clergy. This would not include the case of an escape between the time of pronouncing the judgment and the time
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of the arrival of the offender at the place of transportation. So that if the pardon were absolute in the first instance, such escape would be *casus omissus* in the act, and such an offender would not be liable to punishment: that, therefore, affords a very strong argument against adopting such a construction of the act of parliament, and besides, as the second section does not add the words "being thereof lawfully convicted," it should seem, upon construing this act with reference to the acts of *Car. 2.* before cited, that the party returning would be liable to be executed under his former sentence, which, therefore, must be considered as still in force. The second section goes on to state; "provided, nevertheless, that his majesty may at any time pardon and dispense with such transportation, and allow of the return of the offender;" so that it appears that the transportation may be dispensed with after the party has reached the place to which he is ordered to be transported. It then proceeds; "that after such offenders shall have served their respective terms according to the order of any such court, *such services shall have the effect of a pardon to all intents and purposes.*" So that under 4 G. 1. it is clear that in all cases both of capital and clergyable felonies, if the offenders shall have served the periods of their respective transportation, it is to operate as a pardon of the crimes of which they were convicted. But if the pardon were immediate on their arrival at the place, the act could never have said that the service should operate as a pardon. It follows, therefore, that under this act the pardon was not complete until the service was complete also. Then came 6 G. 1. c. 23., which only gave a power to a subsequent court to order the transportation of such offenders; and
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by the sixth section of which, for the first time, it is enacted, "that if any person shall be at large in *Great Britain* before the expiration of the term for which he was ordered to be transported, and shall be thereof lawfully convicted, he shall suffer death." That act, however, does not materially affect the question. Such was the situation in which the law stood before the passing of the statute 8 G. 3. c. 15. And it is quite clear that no alteration in the law was intended to be made by that act, and which, besides, was applicable only to the cases of prisoners convicted at the assizes. Its object was only to remedy a particular inconvenience which was, that if the king's pleasure were not signified during the assizes the party was obliged to remain in prison till the next assizes without any thing being done. That act, therefore, provided that when his majesty's mercy should be extended to any offender, the Judge before whom he had been tried might on that fact being signified to him by one of the principal secretaries of state, make order for his immediate transportation. It was for this purpose only that that act was passed. It states indeed that such transportation shall have the effect of a pardon under the great seal for such offender as to the crime for which he or she was so convicted. But if by the words "such transportation" in this act were meant only the carrying of the offender to the place of transportation it would produce this effect, that an offender convicted at the assizes would thereby be placed in a different situation from a person convicted at the *Old Bailey*. These words, therefore, in 8 G. 3. c. 15., are not satisfied by the offender being merely carried over, but only by his being carried over and remaining during the term for which he is ordered

to

to be transported, as has been shewn to be the case with those who are transported under the provisions of 4 G. 1. c. 11. Under both acts offenders are entitled only to conditional pardons, and the conditions in both are that they shall be carried over and remain there during the specified term. In this case the party has returned before that period by virtue of the powers granted under 30 G. 3. c. 47., having had the remainder of the term of his transportation remitted by the governor of *New South Wales*. This last statute affords an additional reason for the above construction of the 4 G. 1. c. 11. and 8 G. 3. c. 15. For the offender who returns by permission of the governor of *New South Wales* is only to have the same advantage as if his majesty had signified his intention of mercy under his sign manual, and is to have his name inserted in the next general pardon under the great seal. Now if the mere transportation to the place were an actual pardon, this could not be done; for then it could not be necessary to insert the offender's name in the next general pardon, for nothing would remain to be pardoned. We are, therefore, of opinion, that the mere transportation to the place does not amount to an actual pardon, and therefore that the circumstances stated in these pleadings are not sufficient to restore the plaintiff to all his rights and capacities, and that he still remains in the situation of an attainted felon. As to what the consequences of this determination may be, which forms the second question in the case, we have not yet formed any decisive opinion; and on that point, therefore, we wish to have a second argument.

The case was again argued in last *Michaelmas* term by

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Manning, for the defendant. By attainder, all the personal property of the party attainted, whether in possession or in action, vests in the crown, and that whether the right exist at the time of the attainder, or accrue after. In *Theloal*, b. 1. c. 15. s. 8., it is laid down, that one outlawed, or attainted of felony, shall not have any action real or personal, in any manner, before pardon, but after pardon, he may maintain an action upon a cause of action, accruing *subsequently* to the pardon, and *not before*; and the year-book H. 20 *Edw.* 3. fol. 45., and 29 *Ass.* 63., are cited, where it is stated to have been adjudged, that an outlaw after pardon may have an action for false imprisonment before the outlawry; but it is there also said, that he could not have any action *of debt*, or for carrying away his goods before the outlawry; and for this reason that the right of action was in the king; and in s. 9. is cited the opinion of the Court from the year-book of *Edw.* 3. fol. 92. and 93., that an outlaw after pardon should have *no action of account* for money received *after* the outlawry; and in s. 10., the year-book, 9 *Hen.* 6. fol. 57., is cited to shew, that a lord outlawed shall not have after pardon the rent that was due before the outlawry. These are strong authorities to shew that all the personal rights of the outlaw were actually vested in the crown; and with this agrees *Hawkins' Pleas of the Crown*, b. 2. c. 49. s. 9., where it is laid down, "That all things whatsoever which are comprehended under the notion of personal estate, whether they be in action or possession, which the party has in his own right, are liable to forfeiture; and so, a bond taken in another's name, or a lease made to another in trust, for a person who is afterwards convicted of

treason or felony, are as much liable to be forfeited as a bond made to him in his own name, or a lease in possession." *Bracton*, lib. 3. c. 14. s. 12., is to the same effect; and his expression is, that the person restored after attainder is sicut homo modo genitus. And Lord *Holt* lays down a similar rule in *Britton v. Cole* (a); for he there says, "that if an outlaw purchase goods, the property is *immediately* vested in the king." These authorities establish, not only that the property of the person attainted vests immediately in the crown, but that even a cause of action accruing after the attainder vests without office found; for the authority cited in *Theolal*, b. 1. c. 15. s. 8., and s. 9., which states, that a person pardoned may have an action upon a cause of action accruing subsequently to the pardon, and not before, shews that the crown is entitled to a chose in action accruing after the attainder, without office found; for if not, the party would have been remitted to those rights of action, in respect of which no inquisition had been taken. But even supposing that an inquest of office was necessary, there is in this case that which is tantamount to it. For here is an admission on the record, and no inquest of office can so effectually find and vest a title in the king as this judicial record. For even in the case of forfeiture of lands, which never vest in the king without office, although held by the offender at the time of the attainder, if it appear in pleadings between third parties, that a forfeiture has accrued to the king, no further step on the part of the crown is necessary; but the Court is bound, ex officio, to award execution for the king; and in 9 *Hen. 7. fol. 9. b. .*, it is said, "In divers cases, arising between common per-

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sons, for the advantage of the king, the defendant may plead that the plaintiff is outlawed since the last continuance; whereupon the king shall have judgment upon the outlawry." And the year book 11 *Hen.* 4. 71. *b.*, *M.* 12 *Hen.* 7. 12. *a.*, *T.* 16 *Hen.* 7. 12. *a.*, and *Plowden* 243., *Cro. Jac.* 216., and *Cro. Car.* 290. are authorities to the same effect. It follows, therefore, that a chose in action accruing to a party, even after attainder, vests the right of action in the king. Then if so, the attainder in this case was properly pleaded in bar. *Co. Litt.* 128. *b.* *Gilbert's C. P.* 162. *Hage v. Skinner* (*a*), *Peele v. Evans* (*b*), *Clerke v. Scroggs* (*c*), *Bull v. Tilt* (*d*), *Brown's Vade Mecum*, 282.

Pollock contra. If the subject-matter in respect of which this action is brought be actually forfeited, it must be admitted that the plea of attainder is well pleaded in bar; but if, on the other hand, it be only liable to forfeiture, and not actually forfeited, the plea should have been in abatement only. It appears indeed from the earlier writers, *Bracton*, *b.* 3. *c.* 13., *Glanville*, *b.* 14. *s.* 3., *Fleta*, *c.* 58., and the *Mirror*, *c.* 4. *s.* 4., (which were all written prior to the statute of 17 *Edw.* 2.,) that the doctrine of forfeiture was carried much further, and that an outlaw or an attainted person at that period forfeited not merely his goods and chattels, but every possible right and means of acquiring property; but the statute of 17 *Edw.* 2. *c.* 16. enumerates several of the rights accruing to the crown in respect of attainder, and expressly enacts, among other things, that the king shall have "*omnia catalla*" of felons attainted and fugitives;

(*a*) 3 *Lev.* 29.(*b*) 1 *Lutw.* 610.(*c*) 2 *Lutw.* 1510.(*d*) 1 *Bos. & Pull.* 199.

and

and since the passing of that statute until *Slade's case* 44 *Eliz.* (a) forfeiture by attainder or outlawry has been held to extend only to goods and chattels and debts by obligation; and in many cases debts by simple contract have been expressly held not to be forfeited to the crown. In *Brooke's Abr.*, fol. 137. pl. 19. (b), title *Chose in Action*, it is said to have been adjudged by *Candish*, *Holt*, and *Hanimer*, that if *A.* be outlawed, and *J. S.* be indebted to him upon bond, and the debt be found by office, the king shall have it, although it be a chose in action; but by *Holt* and *Hanimer*, if it be a debt only by simple contract, and not by specialty, the king shall not have it; and for this the 50 *Ass. pl.* 1. is cited, and the reason given is, that it would deprive the debtor of his wager of law, since no man can wage his law against the king. The same case is cited under the title *Forfeiture de Terre*, pl. 47. And under the title *Dette*, fo. 221. pl. 47., this case is put, that if a man be attainted of felony, and *I. N.* be indebted to him upon specialty, the king shall have this; otherwise, if he was indebted *without specialty*, and for this is cited 49 *Ed.* 3. pl. 5., and the same reason is again given. So in title *Forfeiture de Terre*, fol. 342. pl. 26., it is said, that property of goods forfeited by outlawry or treason vests in the king immediately, for which is cited 39 *H.* 6. pl. 26.; and in pl. 58. it is said to have been adjudged per *Choke Justice*, that where *A.* is bound to two by obligation, and one of the two is a *felo de se*, that the obligation is forfeited to the king after office found (c); and in pl. 74. the cases from the 49 *Ed.* 3. pl. 5. and 50 *Ass. pl.* 1. are cited again; and in pl. 107. it is laid down, that an outlaw shall forfeit a chose in action as a debt by specialty; otherwise *of a debt by contract*,

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(a) 4 *Rep.* 93.(b) *Ed.* 1576.(c) 8 *E.* 4. 4.

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or damages in trespass and the like, and the king shall have the action of detinue, and upon obligation in respect of the outlaw, for which are cited 4 *H. 7. pl. 17.*, 49 *Edw. 3. pl. 5.*, and 16 *Edw. 4. pl. 4.*; and in *pl. 120.* it is laid down, that a guardian in socage shall not forfeit the corn upon the land of the heir by his attainder; and so in title "*Office devant Escheator*," *pl. 45.* after stating cases where the king is entitled without office, then follows, "*eadem lex videtur des biens mouvables.*" In *Dyer*, 262., it was the opinion of the two justices that a simple contract debt of a *felo de se* should not be forfeited; and in *Wolley v. Bradwell*, *T. 39 Eliz. (a)*, it was held, that simple contract debts were not forfeited by outlawry; and *Shaw v. Cutteris. (b)* *M. 43 and 44 Eliz.* is to the same effect. *Reeves's Hist. of the English Law*, vol. ii. pp. 21. 24., and vol. iii. p. 140., shews, that this was then considered as law; and in *Markham v. Pitt's case (c)*, *T. 30 Eliz.*, it was holden, that outlawry was not a good plea in debt upon a contract, trespass, battery, or imprisonment; for such things the king shall not have by outlawry; and although outlawry was said to be a good plea in bar to assumpsit on a quantum meruit, in *Webb v. Moore (d)*, 2 & 3 *Will. and Mary*, 9., yet it does not appear that any judgment was afterwards pronounced upon that case. The first case, therefore, where it was held that debts by simple contract were forfeited to the king by outlawry, was *Slade's case (e)*, and that is at variance with all the other cases which are recognised in *Rolle's* and *Brookes'* abridgments. The weight of authority, therefore, greatly preponderates in favour of the proposition, that a simple contract debt does not vest in the crown by attainder or outlawry;

(a) *Cro. Eliz.* 575.(b) *Cro. Eliz.* 851.(c) 3 *Leon.* 205.(d) 2 *Ventr.* 282.(e) 4 *Rep.* 93.

for there is no distinction in this respect between outlawry in civil actions and attainder in criminal proceedings. And if a simple contract would not vest in the crown at all it becomes unnecessary to argue that it will not vest before office found.

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Manning in reply referred to *Staunford, Prerogative*, fol. 45., where it is laid down that under the word *catalla* is comprised a right of action to goods as where goods be taken away wrongfully from the felon or where one is indebted to the felon by obligation, or is accountable to the felon *for any receipts* or otherwise.

Cur. adv. vult.

ABBOTT C. J. in the course of this term delivered the judgment of the Court. This was an action brought by the plaintiff, as indorsee, against the defendant, as payee of a bill of exchange, bearing date the 10th *July*, 1809. The defendant pleaded (*inter alia*) that at an *Old Bailey* sessions, holden on the 16th *September*, 1807, the plaintiff was convicted of felony, and received judgment of death; and the plea proceeded further to state, that his majesty having been pleased to extend his royal mercy to the plaintiff, on condition of his being transported to *New South Wales* for life, and such pleasure having been signified to the Court by one of the secretaries of state, it was further considered, that the plaintiff should be transported to *New South Wales* for life, according to the statute. It is difficult to understand why this was added to the plea, the attainder being the only thing material for the defendant. To this plea the plaintiff replied, that before the cause of action accrued, he was in due manner transported to *New South Wales*, in execution of the judgment. To this replication the

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defendant rejoined, that after the plaintiff had been so transported, he was unlawfully at large in *England*. And to this rejoinder the plaintiff surrejoined, that before the cause of action accrued, his majesty had, by his commission under the great seal, given authority to the governor of *New South Wales*, by an instrument in writing under the seal of the government of the territory, or as he should think fit and convenient for his majesty's service, to remit either absolutely or conditionally, the whole or any part of the term or time for which offenders should be transported; and then the plaintiff proceeded to allege, that before the exhibiting of his bill, the governor of *New South Wales*, by virtue of the said authority, did, by an instrument in writing, under the seal of the territory, absolutely remit the remainder of the term which was then to come of the original order of transportation mentioned in the plea, by virtue of which instrument he was lawfully at large; and then he concluded with a traverse, that he was unlawfully at large, as alleged in the rejoinder. Upon this, the defendant prayedoyer of the instrument in writing, and set it out verbatim on the record, and then *demurred* to the surrejoinder, and the plaintiff joined in demurrer. There is another series of pleading on the record, little differing in form, and not at all in substance, from that which has been mentioned. Upon these pleadings, many questions were raised; but at length the case appeared to resolve itself into two questions of substance. First, whether the transportation or actual conveying of the person of the plaintiff to *New South Wales* operated as a present and immediate pardon, and an immediate restoration to all civil rights, as was contended by the replication. And supposing it did not; then, secondly, whether the attainder of the plaintiff

tiff was properly pleadable in bar, or ought to have been pleaded in disability only, to this action, founded on a personal demand, accruing *after* the attainder. The case was first argued at *Serjeants' Inn*, before my Brothers *Bayley*, *Holroyd*, and myself; and my Brother *Bayley* there delivered our unanimous opinion upon the first question against the plaintiff; namely, that the transportation did not operate as a present and immediate pardon: and we desired the second question to be again argued, which was accordingly done in the last term. Upon consideration, we are of opinion, that the attainder of the plaintiff was properly pleadable in bar. An attainted person is considered in law as one *civiliter mortuus*. He may acquire, but he cannot retain; he may acquire, not by reason of any capacity in himself, but because if a gift be made to him, the donor cannot make his own act void, and reclaim his own gift; and as the donor cannot do this, and the attainted donee cannot enjoy, the thing given vests in the crown by its prerogative, there being no other person in whom it can vest. The learned counsel for the plaintiff did not deny this, as to lands and corporeal chattels and debts by obligation, but contended, that the word *catalla*, in the statute 17 *Edw. 2. c. 16.*, must be understood of corporeal chattels only, and debts by obligation, and had not been carried further, down to the time of *Elizabeth*; and that the subsequent cases, in which it had been decided that choses in action, or debts by simple contract, were forfeited for felony or outlawry, were not warranted by law. And in support of this, the opinion of the two justices, in the 9 *Eliz.*, *Dyer*, 262., and some older authorities in the year books, were quoted and

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relied on, in which that opinion was entertained, upon the technical reason, that the debtor would be thereby ousted of his law-wager. These authorities are all referred to in support of the second objection, taken in *Slade's case*, 4 Co. 93.; but the objection did not conclude from them, that the felon or outlaw should have the debt, but that the debtor, by the judgment of the law should be rather discharged of his debt, than lose the benefit of his law-wager. And therefore, supposing these opinions to be correct, they would not enable the plaintiff to maintain his action, but would rather shew, that in judgment of law, the defendant was wholly discharged and answerable to nobody. At the conclusion, however, of the report of *Slade's case*, it will be found that those authorities were not acknowledged, and the better opinions in other books there referred to are mentioned; the uniform practice, and a late decision of the Court of Exchequer are also mentioned; and from that time to the present, debts by simple contract have been constantly seized into the king's hands upon outlawry. Indeed the words *bona et catalla*, jointly or separately in our ancient statutes and law-writers, denote personal property of every kind, as distinguished from real. Thus *Magna Charta*, c. 18., which provides that the king's debt shall be first paid, and the residue remain to the executors of the debtor, uses the words *bona et catalla*; and under a writ of *diem clausit extremum*, debts, whether by specialty or simple contract, are always found and seized into the king's hands; and, if necessary, a *scire facias* issues to enforce payment of them. So the statute 31 Ed. 3. stat. 1. c. 11., which is in *French*, directs the ordinary to depute the next friends of an intestate to administer his goods,
biens,

biens, and then proceeds to enact that the persons deputed may have an action to recover, as executors, the debts due to the intestate.

For these reasons, if the case had rested upon the plèa and replication, it would appear that the plaintiff had no property in the bill of exchange, and could not sue upon it. By the subsequent pleadings it appears, that before the action brought, the governor of *New South Wales*, had (as by law he might) absolutely remitted the remainder of the plaintiff's term of transportation, but it is not alleged as it ought to have been, if the fact was material and true, that this remission was made before the indorsement of the bill of exchange to the plaintiff. The remission has by the stat. 30 G. 3. c. 17. the same effect as the signification of his majesty's royal intention of mercy under his sign manual; and the name of the party is to be inserted in the next general pardon, which shall pass under the great seal. It is not put by the statute upon the footing of a completion of the term of transportation, nor considered as a fulfilment of the condition upon which the capital punishment was originally remitted, so as to entitle the party to that pardon which is mentioned in 24 G. 3. c. 56., but its utmost effect is to entitle the party at a future time to have a new and distinct pardon to operate from that time, without any relation to his original transportation, or to the act of remission, and in the mean time to stand as a person with a sign-manual pardon. Now the intention of mercy signified under the sign manual, has not the legal effect of a pardon under the great seal; and in general a pardon under the great seal does not, without words of restitution, enable the grantee to sue

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upon an obligation which had vested in the king by his attainder. It is not necessary for us to say what will be the effect of a pardon under the great seal, to a person in the plaintiff's situation with reference to a demand like the present. If such a pardon shall have the effect of enabling the plaintiff to sue upon this bill, it will confer upon him a new right of action, to which our judgment in this case will be no bar. For these reasons, we who heard the argument are of opinion, that the judgment must be given for the defendant; and my Brother *Best*, who has taken the trouble to look into the papers and consider the case, agrees with us in this opinion.

Judgment for the defendant upon
the third and fourth pleas.

See 2 Roll. Abr. 178. tit. Prerog. de Roy Pardon.

Saturday,
Jan. 23d.

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A justice of the peace is authorised to require surety of the peace for a limited time, according to his discretion, and need not bind the party over to the next sessions only.

TRESPASS for assault and false imprisonment.
 Plea not guilty. This cause was tried at the *Spring* assizes, 1817, for the county of *Sussex*, before Mr. Serjeant *Bosanquet*. It appeared in evidence, that the plaintiff, a gentleman farming his own estate at *Lancing*, in that county, was brought before the defendant, a justice of the peace, acting in and for that county, by virtue of a warrant under the hand and seal of the defendant, directed to the high constable of *Brightford*, in the said county, granted on the information and complaint upon oath of *James Martin Lloyd*, esquire,

esquire, in order to the plaintiff's finding surety towards the king and all his subjects, and in particular towards *James Martin Lloyd*. That on hearing the complaint, the defendant required the plaintiff to find surety for keeping the peace for two years, himself in 500*l.*, and two sureties in 250*l.* each. That the plaintiff then offered to enter into the security required of him for 500*l.*, and had one surety ready to join him in the sum required, namely 250*l.*; but not being provided with a second surety in that sum, he was, on the 2d day of *October*, committed to the custody of the high constable, by another warrant, signed by the defendant, to the tenor and effect following:

“*Sussex*, to wit. To the constable of the hundred of *Brightford*, in the said county, and to the keeper of the house of correction at *Petworth*, in the said county: whereas *William Willes*, of *Lancing*, in the said county, yeoman, is now brought before me, *Henry Bridger*, esq., one of the justices of our lord the king, assigned to keep the peace in and for the said county, requiring him to find sufficient sureties to be bound with him, in a recognizance for his keeping the peace towards our said lord the king, and all his liege prople, and especially towards *James Martin Lloyd*, of *Lancing*, esq., one other of the justices of our lord the king, assigned to keep the peace, in and for the said county; and whereas he the said *William Willes* hath refused, and doth now refuse to find such sureties before me; these are, therefore, in the name of our said lord the king, to command you, the said constable, forthwith to convey the said *William Willes* to the house of correction at *Petworth*, in the said county, and to deliver him to the keeper thereof together with this pre-

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cept; and I do, in the name of our said lord the king, hereby command you, the said keeper, to receive the said *William Willes* into your custody, in the said house of correction; and him there safely to keep *for the space of two years, unless he shall, in the mean time, find such sureties as aforesaid, for his keeping the peace towards our said lord the king, and all his liege people, and especially towards the said James Martin Lloyd, for the space of two years from the date hereof.* On the following day, the plaintiff having been conveyed in custody as aforesaid to *Arundel*, in the same county, on the way to the said house of correction at *Petworth*, was admitted to bail by several justices of the peace for the said county, and entered into a recognizance before the said justices, according to the exigency of the said warrant, himself in 500*l.*, and two sureties in 250*l.* each respectively, for keeping the peace towards the king and all his liege people, and especially towards the said *James Martin Lloyd*, for the space of two years from the date of the said warrant. The jury found a verdict for the plaintiff for 40*s.*, the learned judge reserving for the opinion of this Court the legality of the warrant, under which the plaintiff was committed. Upon motion, this Court ordered that a case should be stated for their opinion, upon two points: first, whether the warrant of commitment was legal; and, secondly, whether the action would lie against the defendant, being a justice of the peace, under the circumstances above stated.

Knowllys, for the plaintiff. The warrant of commitment was in this case illegal, inasmuch as a justice of the peace has no authority to bind over a party to keep the peace for a time certain, but only to the next sessions.

sions. *Hawkins*, it is true, lays it down (although doubtfully) that he may do so. (a) For he says. "If it be taken in pursuance of a writ of supplicavit, it must be wholly governed by the directions of such writ; but if it be taken before a justice of peace, upon a complaint below, it seems that it may be regulated by the discretion of such justice, both as to the number and sufficiency of the sureties, and the largeness of the sum, and the continuance of the time for which the party shall be bound," and for this he quotes the authority of *Lambard* and *Dalton*. But it is observable, that *Hawkins* himself, s. 16., immediately adds, "However, it seems to be the safest way to bind the party to appear at the next sessions of the peace;" and in s. 18. he says; "that if it be taken on a complaint below, it must be certified to the next sessions of the peace, by force of 3 Hen. 7. c. 1., that the party so bound may be called; and if he make default, it shall be recorded, and the recognizance certified into one of the courts at *Westminster*." It is clear, therefore, at all events, that the defendant has here deviated from the safer and better way. But the authorities quoted by *Hawkins* by no means support the proposition laid down by him. *Lambard*, in his *Eirenarcha*, lib. 1. c. 16. (b), lays it down, that a justice of the peace may command surety, either as a minister, where he acts under a writ of supplicavit, or as a judge by virtue of his commission. And the conclusion of the warrant in both these cases is precisely the same; "that if the party refuses to give surety, then he shall be committed to gaol, until he do so, that he may be before the justices of the

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(a) Book 1. c. 60. s. 15.

(b) P. 83. edit. 1582.

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peace at the next sessions, there to answer for his contempt, &c.” The passage referred to by *Hawkins*, will be found p. 109., and is as follows : — “ If the justice of the peace deal in this matter as a judge, and by virtue of his commission, then the number of the sureties, the sum of their bond, their sufficiency in goods or lands, the time how long the party shall be bound, and such other circumstances, are referred wholly to his own consideration.” And for this he quotes the authority of *Marrow*, a Master in Chancery, who wrote on this subject, in the 18 *Hen.* 7., and the MS. of whose work is said to be still preserved in *Lincoln’s Inn* library. *Dalton* (a), in his *Country Justice*, says, “ that a justice may take a recognizance, and bind the party to keep the peace for one year, or for a longer time by his discretion; yea, he may bind the party during his life;” and for this he quotes *Marrow’s* sixth reading. In fact, the whole of this law rests upon *Marrow’s* sole authority. Now *Marrow’s* authority is much weakened by several passages, where *Lambard* differs from him. These will be found in *Eirenarcha*, pp. 93. 99. 113. In the two former of these passages, he points out some great mistakes of *Marrow’s* on this subject; and in the last, he says, “ but for the better eschewing of error and hard dealing in making this recognizance of the peace, it is good to use the received form, which is thus,” and he then subjoins the form of a recognizance, binding the party over *to appear at the next sessions*, there to do what the Court then shall award. So that from this, it clearly appears, that the opinion of *Lambard* was, that the power was so limited. *Dalton* also,

(a) *Chap.* 119. *p.* 393. *edit.* 1727.

after stating *Marrow's* opinion, afterwards adverts to the 3 *Hen. 7. c. 1.*, and says, "whereby it may seem that every recognizance taken for the peace now ought to be to appear at the next sessions." Now, if the law were as contended for by the defendant, for what purpose could the justice, in compliance with the 3 *Hen. 7. c. 1.*, certify the recognizance, or how could the party be called on it, and his default recorded; for he would be in custody under the warrant committing him for a specific time, and so could not appear. This shews, therefore, strongly, that such a warrant is illegal; besides, the surety for the peace, and that for good behaviour, are by *Lambard* and *Dalton* put on the same foundation. And with respect to the latter, Lord *Hale* says (*a*), "the statute 34 *Edw. 3. c. 1.* gave the justices power to apprehend malefactors, and to commit them to custody, or to bind them to their good behaviour, which was not intended perpetual, but in nature of bail, to appear at such a day, at their sessions; and in the mean time to be of good behaviour." *Crompton* (*b*) lays it down, that a justice may bind over to keep the peace, and to appear at the next general sessions. *Pulton* (*c*) also is to the same effect. And in all these books, there is a uniform course of precedents to be found, setting out, that the party bound shall appear at the next sessions. Then, if the reason of the thing be considered, it will appear that *Marrow's* authority is not entitled to much weight. For he says "that a justice may bind for life." So that the bill of rights, which said that excessive bail should not be required, would be infringed by this. For bail may be

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(*a*) Vol. 2. p. 136. c. 16.(*b*) P. 138. b. edit. 1606.(*c*) P. 18. a. edit. 1610.

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excessive in duration as well as in amount. In *Rex v. Bowes* (a), it was doubted, whether even the Court of King's Bench could bind for more than one year: yet if a single justice of the peace could bind for life, it would be very strange that any such doubt could be entertained. The warrant, therefore, was in this case, illegal. On the second point, he cited *Morgan v. Hughes*. (b)

Taddy Serjt., for the defendant. This case depends on the authority given to justices by their commission, by which they are empowered to cause to come before them all those who to any of the people concerning their bodies or burning of their houses have used threats to find sufficient security for the peace or their good behaviour, and unless they do so to commit them to prison. The power is general to cause them to find sufficient security. The question, therefore, of the sufficiency both as to the sum and the duration must be left in their discretion. And it is to be observed that in all the precedents the commitment is general, viz. that he be committed till he willingly do the same. It is true there is also a clause so that he may appear at the next sessions to answer for the contempt, but he is not committed to the next sessions. Besides, it is to be observed, that the conclusion of the warrant in the case of the writ of *supplicavit* is precisely the same, and yet in that case it is clear that the time for which the party may be bound may exceed the next session, for from the form of the writ, as given *Reg. Brev. fol. 9.*, it appears that the power to commit is there general. The

(a) 1 *Term Rep.* 696.(b) 2 *Term. Rep.* 225.

precedents, therefore, are not of great authority, and are rather useful for safe conduct than for establishing any point of law. Then *Marrow's* authority, which is copied into all the text writers, is uncontradicted and express on the point. And the circumstance of *Lambard's* differing with him in the passages cited rather strengthens it. For from this opinion *Lambard* does not express any dissent at all. As to the statute 3 *Hen. 7. c. 1.* it is to be observed it is merely directory; and *Dalton* (a) says, that if the recognizance be to appear at any other sessions after, (and not at the next,) it is good. The same law is laid down in *Crompton*, p. 141. b. Now, if the party may pass over the first sessions the whole argument on the other side falls to the ground. With respect to the dictum of *Marrow* that it may be for life, it is to be observed *Lambard* does not state it so: he only says, that according to *Marrow* the time is in the discretion of the justice; and that limitation of *Marrow's* opinion will be quite sufficient for the defendant in this case. On the second point he cited *Ackerley v. Parkinson.* (b)

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Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This case was very ably argued at *Sergeants' Inn Hall* before my Brothers *Bayley* and *Holroyd* and myself. Two questions were raised upon the facts stated, but as we are of opinion that the warrant upon which the plaintiff was committed was a legal warrant, it is not necessary for us to give any opinion upon the other question, or to say whether or no the defendant

(a) *Country Justice*, c. 119.(b) 3 *Maule & Sel.* 411.

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could have resisted this action upon the ground of his official character, if the warrant had not been consonant to law. The present action is an action of trespass, in which the plaintiff complains simply of the fact of his arrest and imprisonment. He does not complain of any harsh, undue, or oppressive exercise of a legal authority, for which, if any such had existed, though none at present appears, the remedy would have been of a different nature; but he complains of the act alone and rests his case upon the supposed illegality of the warrant under which he was committed. The authority of a justice of the peace to require, upon due complaint made to him in his judicial character, sureties for the keeping of the peace, and to commit a person to prison for want of such sureties, is not nor could be denied; but it is contended on the part of the plaintiff, that the surety can only be required for appearance at the next sessions, and for keeping the peace in the mean time, and consequently that the commitment for want of surety can only be until such surety be given as the justice might in the first instance require and take, that is, for appearance at the next sessions, and for keeping the peace in the mean time; whereas the warrant under which the plaintiff was committed commands his imprisonment for two years, unless in the mean time he shall find sureties for two years from the date of the warrant. The argument in support of this proposition rested mainly upon the provisions of the statute 3 *Hen. 7. c. 1.* at the close of which statute after several enactments relating to the duties of coroners and to appeals in cases of murder it is ordained that every justice of the peace who shall take any recognizance for the keeping of the peace do certify, send, or bring the same recognizance to the
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next sessions of the peace, that the party so bound may be called; and if the party make default, then the recognizance and the record of the default are to be certified into the Chancery, King's Bench, or Exchequer. But the authority of a justice to take surety for the peace, existed long before this statute, and is derived from the commission of the peace, which appears to have had its origin in the statute 1 *Edw.* 3., stat. 2. c. 16., by which it is enacted only in very few and general words that persons shall be assigned by the king in every county to keep the peace. The authority to be given to these magistrates is more fully set forth in the statute 34 *Edw.* 3. c. 1., by which they are to have power to restrain offenders, and to arrest and chastise them, and cause them to be imprisoned, and punished according to law; to arrest all those that they may find by indictment or suspicion, and to put them in prison; to take of all them that be not of good fame, where they shall be found sufficient surety and mainprize of their good behaviour towards the king and his people; and also to hear and determine, at the king's suit, all manner of felonies and trespasses: and writs of oyer and terminer are to be granted, according to the statutes. Upon the first of these statutes, it may be observed, that the power to keep the peace seems necessarily to imply an authority to take surety from persons who have manifested an intention to break it; for otherwise such persons could only be restrained from the accomplishment of their intention, by the actual restraint or imprisonment of their persons. And, upon the latter statute, it may be observed, that the clause relating to surety and mainprize of good behaviour to be taken of persons of evil fame,

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is distinct from the clause relating to persons found by indictment or suspicion, which must be meant of persons charged with the actual commission of some offence, for which an indictment hath been or may be found. Those two clauses, however, appear to have been considered together, by Sir *M. Hale*, in 2 *Pl. C.* 136., a passage which was much relied upon in the argument for the plaintiff. “The statute 34 *Edw.* 3. c. 1.” says the learned writer, “gave them power to apprehend *malefactors*, and to commit them to custody, or to bind them to their good behaviour, which was not intended perpetual, but in nature of bail, viz. to appear at such a day at their sessions, and in the mean time to be of good behaviour.” This passage is found in a chapter treating of the bailment of prisoners and not of surety for the peace, and it is plain from the other parts of the chapter, that the persons who are the subject of it are persons charged with offences, for which it is supposed they are to be brought to trial. With regard to such persons, the surety or mainprize must necessarily be taken for appearance at some definite time and place, at which an indictment may be preferred or brought to trial against them; and it is proper, that the surety should also extend to their good behaviour in the mean time. The statute 3 *Hen.* 7. c. 1. appears also to contemplate persons of this description, that is, persons against whom an indictment may be expected to be preferred. It is perfectly reasonable, that such persons should be bound to appear at the next sessions, in order that they may be forthcoming to answer to an indictment. Many of those against whom surety of the peace is required are of this description; persons supposed to have actually committed, and not

merely to meditate an indictable offence; and the enactment may well be considered as cumulative rather than restrictive; as requiring that every person bound to keep the peace shall be bound also to appear at the sessions, for the purpose of answering any charge that may be then preferred against him, whether for any previous offence by indictment, or for a breach of the peace, committed after the recognizance, and not as limiting the surety and obligation to such an appearance, and to that alone. And this is conformable to the precept for the peace given in *Lambard's Eirinarcha*, b. 2. c. 2. p. 85. of the edition of 1614. The precept, as there set forth, requires the officer to bring the party before a justice, to find sufficient surety and mainprize, *as well* for his appearance at the next quarter sessions of the peace, as also for the peace to be kept towards the king, and all his people, and especially towards the person requiring the surety, and not according to the form of recognizance, then and since chiefly in use, to appear at the sessions, and in the mean time to keep the peace. The precept further proceeds to require, that if the party shall refuse to do this, then, without further warrant, he be conveyed to prison, there to remain until he shall do so; so that he may be before the justices at the sessions, to answer to the king for his contempt in this behalf. The precept in *Foster's case*, 5 Co. 59., which was quoted at the bar, appears to have required the officer to take the party before a justice, that she might give security not to do any injury to the complainant, without any mention of appearance at the sessions; and no objection was taken on that account. Several of the text writers quoted in the argument for the plaintiff, say, that the justice may take the surety

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for such time, in such sum as he shall think fit, (which must mean, in the exercise of a sound and legal, and not of a wilful or arbitrary discretion,) and no one directly asserts the contrary; although they all say the safer course is, to take the surety only for appearance at the next sessions, and for keeping the peace in the mean time; thus referring it to the sessions to take a fresh security, if articles be exhibited, or to try the party, if an indictment be preferred. The power of the justices assembled at their sessions, to take surety for the peace, is derived from their commission, and is found in the first clause, or assignavimus, of the commission, and by that clause the power is given to any one justice, and not to two or more, as is done by the second clause, which relates to the taking and trial of indictments, and some other matters; and, therefore, if a single justice cannot take security for a longer period than until the next sessions, it will be difficult to shew, that a number of justices assembled at sessions may take it for a longer time; and unless they can do so, then, as it may be in most cases expedient that the period of surety should be longer than the interval between sessions and sessions, both parties, or at least the party required to give the surety, and his mainpernors, must be harassed by repeated attendances, to accomplish an object, which may be as well effected by a single attendance, at which the whole matter may be heard and discussed. It may, in some cases, be expedient, that the time and amount of the security should be settled by the concurrent sentiments of several persons, rather than by the single opinion of one individual; and, therefore, we would be by no means understood to disapprove of the usual practice, which

which is, to take the surety until the next sessions only. On the other hand, expence and trouble are saved by an adjustment of the whole matter in the first instance; and therefore there may be other cases in which this may be the most convenient course. The present case, however, does not turn upon any question of convenience or expedience, but simply upon the power of the justice, and the legality of the warrant. For the reasons given, we who heard the argument, are of opinion, that the warrant is legal, and therefore the postea must be delivered to the defendant. I may add, that my Brother *Best*, who has considered this case, concurs in this opinion.

Judgment for Defendant.

POWELL against LOXDALE.

Saturday,
Jan. 23d.

THE following case was sent by the Lord Chancellor for the opinion of this Court:

Martha Powell, by her will, dated the 1st day of June, 1770, devised all her messuage, tenements, and farm, with the lands, hereditaments, and appurtenants thereunto belonging, in *Westley*, in the county of *Salop*, and all other the messuages, lands, tenements, and hereditaments that she should die seised or possessed of, unto her brother *John Powell*, and the heirs of his

M. P. devised all her lands, &c. in *Westley*, in the county of *S.*, to *A.* and his issue; and in default of issue to such uses as *A.* might by his will appoint: *A.*, by a will made in the lifetime of *M. P.*, devises all his lands in the parish of *Worthen* and

elsewhere in the county of *S.*, after several estates for life and in tail, to his own right heirs in fee: and afterwards, by a codicil made after the death of *M. P.*, revokes the devise of the reversion to his heir (in all other respects expressly confirming the will), and then devises the reversion in fee of all his said lands in the parishes of *Worthen*, *Westbury*, and *Cherbury*, in the county of *S.*, to *B.*; *A.* had no other land in *Westbury*, except what he took under the will of *M. P.*: Held, however, that the power of appointment was not well executed by the codicil.

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body lawfully to be begotten; and for default of such issue, to such uses, &c. as he the said *John Powell*, by any deed or writing, or by his last will and testament, duly executed in the presence of three or more credible witnesses, should appoint the same; and in default of such appointment, she devised the same to *John Kynaston Powell*, and the heirs of his body lawfully begotten; and in default of such issue, to his brother *Edward Kynaston* and the heirs of his body lawfully to be begotten; and in default of such issue, to the right heirs of the said *John Powell*: and all the rest of her real and personal estate, she devised to her said brother *John Powell*, his heirs, executors, and administrators; and, lastly, she nominated him sole executor of her last will and testament.

Martha Powell died in the year 1780, without having revoked her will, and *John Powell* her brother, and heir at law, thereupon became entitled by virtue of the will, to the estate and premises, as the devisee thereof in tail general, with such power of appointment as in the will was mentioned, and subject to such power of appointment in *John Powell*, *John Kynaston Powell* became entitled to the next remainder in tail in the *Westley estate*, and the ultimate remainder or reversion was vested in fee in *John Powell*. *John Powell* had in the life-time of the testatrix made his will in writing bearing date the 28th day of *November 1774*, which was signed by him and duly attested to pass real estates, whereby he devised all his manor of *Worthen* in the county of *Salop*, and all his lands and premises situate in the parish of *Worthen* and elsewhere in the county of *Salop*, to the use of his sister the testatrix *Martha Powell*, who was then living, for her life; with remainder
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to trustees for a term of 500 years upon certain trusts therein mentioned; with remainder to the use of *John Kynaston Powell* for life; with remainder to the use of trustees to preserve contingent remainders; with remainder to his first and other sons in tail male; with divers remainders over, and with the ultimate reversion or remainder in fee to the use of the testator's right heirs for ever. The testator afterwards made three codicils to his will, which related only to his personal estates; but when, after the death and under the will of the testatrix *Martha Powell*, he became seised of the estate and premises at *Westley*, he made and published a fourth codicil, bearing date the 10th day of *August*, 1791, which was attested by three witnesses in the words following; that is to say, "Whereas I have in my last will, bearing date the 28th day of *November*, 1774, (amongst other things) devised all that my manor of *Worthen* in the county of *Salop*, with the rights, royalties, and appurtenances thereto belonging, and hereditaments situate in the parish of *Worthen*, and elsewhere, in the said county, (after several estates for life, and in tail, and remainders, therein mentioned, are determined,) to my right heirs. Now I do hereby revoke and make void the said gift and devise to my right heirs, and I do in lieu thereof give and devise the ultimate reversion in fee of all my said estates in the parishes of *Worthen*, *Westbury*, and *Cherbury*, in the said county of *Salop*, to my nephew *John Kynaston Powell* named in my will, and his heirs. And I do hereby confirm my said will and codicils annexed thereto, and all matters in every other respect." The said *John Powell* had not any estate in the parish of *Westbury* except the said farm and premises at *Westley* devised to him by the will of *Martha Powell*, which is situate in the parish of *Westbury*, and he died with-

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out issue, and without having made any appointment, or suffered any recovery of the *Westley* estate.

The questions directed by the Lord Chancellor, for the opinion of the Court, were, first, Whether she power of appointment given to *John Powell*, by the will of *Martha Powell*, was well executed by the fourth codicil to his will? secondly, What estate *John Kynaston Powell* took in the *Westley* estate. The case was argued at the sittings at *Serjeants' Inn* Hall, before last *Michaelmas* term.

Parke, for the plaintiff. The power of appointment was not well executed by the fourth codicil to *John Powell's* will; for, admitting the general rule to be, according to the cases from *Acherley v. Vernon* (a), down to *Goodtitle v. Meredith* (b), which are cited in the latter case, that a will and codicil confirming it, operate together as a new will, speaking at the date of the codicil; and admitting also that it may operate as an appointment without any express recital of the power, yet it must appear to have been the intention of the devisee to execute the power; and unless that clearly appears, either on the face of the will, or from collateral circumstances, it will not be a valid execution. *Strope's* case. (c) In *Hales v. Marjorum* (d), it is laid down by the Master of the Rolls, as a clearly established law, that to execute a power, there must either be a direct reference to it, or a clear reference to the subject, or something upon the face of the will, or independently of that, some circumstance which shews, that the testator could not have made that disposition,

(a) *Com. Rep.* 381.(b) 2 *Maule & Selw.* 5.(c) 10 *Rep.* 143. 2 *Eq. Ca. Abr.* 659. *Ex parte Caswell*, 1 *Atk.* 559.(d) 3 *Ver.* 300.

without having intended to include the subject of the power; and circumstances that only render it *probable* that his intention was such, are not sufficient; as for instance, where power is given to the husband, after the death of his wife, and the husband makes a disposition to take effect, after the wife's death, *Andrews v. Emmott* (a); nor will it do, if it be shewn that the instrument is executed in the manner required by the power; nor that the testator had not enough to pay legacies] given by his will, unless the property over which the power was given was included. Now here the codicil does not expressly refer to the power, nor is there any thing on the face of the will, or any circumstance independent of it, which shews clearly that the testator's intention was to execute the power. The intention seems to have been to alter the will, only with respect to the devise of the reversion in fee; in all other respects it was to stand good; and the codicil was meant to operate only on the same property, of which he had devised the reversion in the will; and accordingly, by the codicil, he devises the reversion of the *said* estates, that is, the estates mentioned in the will. It is true, that in the devise of the reversion in the codicil, the estate at *Westbury* is mentioned, but that must have been by mistake; for to give effect to that term, would be inconsistent with the general intention of the testator, as expressed in this codicil, and also inconsistent with the words *said estates*, which refer to those mentioned in the will. Either the word *said* or the word *Westbury* must be rejected; and the Court will naturally reject

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(a) 2 Bro. Ch. Cas. 297.

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that, which, if it remained, would be wholly inconsistent with the general intention, as expressed in the codicil. The codicil, therefore, ought to be read as if *Westbury* were wholly omitted; and in that case cadit questio. It follows, therefore, that *John Kynaston Powell* took an estate tail, by virtue of the will of *Martha Powell*: but, secondly, if the word *Westbury* cannot be rejected, and some interest in the *Westley* estate must be taken to have past by the codicil, then, inasmuch as *John Powell* had the ultimate reversion in fee, under the will of *Martha Powell*, of the *Westley* estate, that reversion in fee passes by the codicil; and satisfies the words of it, without making it necessary that *John Powell* should be taken to have thereby executed his power; and the general rule governs that case, that “where one has an authority, and does an act which can be good no other way but by virtue of the authority, it shall be understood to have been done by virtue of his authority; but where one has an interest and an authority together, and he does an act generally, it shall be construed in relation to his interest, and not to his authority.” *Andrews v. Emmott*, 2 *Brown Ch. Cas.* 301. *Parker v. Kett*, 12 *Mod.* 469. *Sir Ed. Clere’s case*, 6 *Coke*, 18. *Colet v. Bishop of Coventry*, *Hob.* 159. *Cox v. Chamberlaine*, 4 *Vez. J.* 631.

Chitty, contra. Admitting the rule to be, that there must be a clear reference to the power, in order to make this codicil a valid execution of it, it may be safely contended that there is a clear reference to it here; for the testator had not any estate at *Westbury*, except that which he had the power to dispose of under the will of *Martha Powell*: By the codicil, after confirming
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his will in other respects, he devised the ultimate reversion in fee, of all his estates in the parish of *Westbury*, together with the reversion of his estates in *Worthen* and *Cherbury*; and he must, therefore, be considered as having intended to have made some disposition of some interest in the estate in question, and of an interest depending too on prior interests similar to those created by his will in his *Worthen* and *Cherbury* estates. The language of the will must indeed be taken to be inserted in the codicil, and the case may then be considered as if the will and codicil formed one entire instrument of the date of the latter, and as if the testator in that one instrument had devised the several estates as in his will (with the exception of the reversion to his right heirs) and then devised the reversion of all his *said estates* in the parishes of *Worthen*, *Westbury*, and *Cherbury*, in the said county of *Salop*, to his nephew *John Kynaston* and his heirs. As, therefore, his estate in *Westbury* is expressly mentioned in the last devise, and as the testator evidently meant to devise the reversion of all his said estates, viz. those out of which he had by other devises in the will carved particular estates, it seems to follow by necessary inference, that he must have intended to comprize the *Westbury* estate in all the prior devises; and in that case such a will of the date of the codicil is admitted to be a good execution of the power. The will itself has words large enough to comprize the *Westbury* estate, if it had been his absolute property, and that will being confirmed by a codicil describing the *Westbury* estate as part of the property which he considered as limited to particular uses, by the will, the words *said estates*, may be applied to the

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Westbury estate, with reference to the will, and to the dispositions contained in it; and then the will and codicil together is an execution of the power.

The following certificate was afterwards sent.

We have heard this case argued by counsel, and have considered it, and are of opinion,

First, That the power of appointment given to the said *John Powell*, by the will of the said *Martha Powell*, was not well executed by the said fourth codicil to his will.

And, secondly, that the said *John Kynaston Powell* takes an estate tail to him and the heirs of his body in the said *Westley* estate.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

Monday,
Jan. 25th.

WHITE *against* GEROCH.

In declaration for pirating a book, an allegation that plaintiff was the author of a book, being a musical composition, called *A.*, is well supported by shewing him to be the author of a musical com-

position of that name, comprised in and occupying only one page of a work with a different title, which contained several other musical compositions.

The 54 G. 3. s. 156. does not impose upon authors as a condition precedent to their deriving any benefit under that act, that the composition should be first printed; and therefore an author does not lose his copyright by selling his work in manuscript before it is printed.

DECLARATION stated plaintiff to be the author of a certain book, being a musical composition for a dance, called *Captain Wyke*; and as such, that under the stat. 54 G. 3. c. 156., he had the sole liberty of printing and reprinting such book for twenty-eight years from the day of first publishing the same. Breach, that plaintiff published divers, to wit, 1500 copies of

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the same. Plea not guilty. At the trial before Bayley J., at the last *Middlesex* sittings, the plaintiff proved that he was the composer of a number of tunes for country dances, published together in a book, under the title of "*White's Collection of new and favourite Dances.*" On one page of this book there was printed a tune called *Captain Wyke*: this composition had never been published separately, but had always formed part of one entire work. It also appeared that the plaintiff had sold several thousand copies of the dance called *Captain Wyke*, in manuscript, a year before it was printed. Upon this it was objected, that the composition in question was not a book, as described in the declaration; and, secondly, that by the previous sale in manuscript, the plaintiff had lost the benefit conferred by the 54 G. 3. c. 156. The learned judge directed the jury to find a verdict for the plaintiff, with liberty for the defendant to move to enter a nonsuit; and a rule nisi was now moved for by

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Campbell. The plaintiff gave no evidence that he was the author of a book called *Captain Wyke*. Admitting that a single sheet may be a book, within the meaning of the act, according to *Clementi v. Goulding* (a), yet in that case, the publication constituted one entire thing; but here the composition in question is one of several, the whole of which, taken together, constitute a book. The whole publication, entitled "*White's Collection of new and favourite Dances,*" is clearly a book within the meaning of the act; and if so, this single composition constituting only a part of it, cannot be

(a) 2 *Campb.* 25. 11 *East*, 244.

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such a book ; or there is no difference between a part and the whole. A collection of music must come under the same law as a collection of tales. Suppose, in an action of this sort, the plaintiff should declare, that he was the author of a book called Aladdin, or the Wonderful Lamp, would that allegation be supported, by shewing, that he was the author of a book called the Arabian Nights' Entertainments, because in one of the volumes of that book, there is to be found a tale, entitled Aladdin, or the Wonderful Lamp. Secondly, the act of parliament enacts, " that the author of any book which shall hereafter be printed and published, shall have the sole liberty of publishing such book, for twenty-eight years, to commence from the day of first publishing the same." In this case it was proved, that the author had published the composition in manuscript a year before it was in print. The statute has made the printing a condition precedent; and the plaintiff not having, therefore, complied with that condition, cannot claim any benefit under the statute. The printing of the book for the benefit of the public, when it is first published, is the consideration paid by the author for the monopoly conferred upon him.

ABBOTT C. J. The object of the legislature was, to confer upon authors, by the act in question, a more durable interest in their compositions, than they had before ; and I am of opinion, that any composition, whether large or small, is a book within the meaning of this act of parliament. It is perfectly clear, that it would be a book, if printed as a separate and distinct work ; and if so, it seems to me, that it does not lose that character,

racter, by being found in company with other compositions. Upon the second point, I am of opinion, that the author does not lose his copyright, by having first sold the composition in manuscript; for the statute 54 G. 3. c. 156. must be construed with reference to the 8 *Anne*, c. 19., which it recites, and which, together with the 41 G. 3. c. 107., were all made in *pari materia*, for the purpose of enlarging the rights of authors. The 8 *Anne*, c. 19. gave to authors a copyright in works not only composed and printed, but composed and *not printed*; and I think that it was not the intention of the legislature, either to abridge authors of any of their former rights, or to impose upon them as a condition precedent, that they should not sell their compositions in manuscript before they were printed.

Rule refused.

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KEARNEY *against* KING.

Monday,
Jan. 25th.

ASSUMPSIT against the defendant as acceptor of a bill of exchange. The declaration stated, that Messrs. *Egges* and *Power* on the 1st of *May*, 1816, at *Dublin*, to wit, at *Westminster*, &c. made a bill of exchange directed to the defendant, requiring him, eight months after dated, to pay to their order the sum of 542*l.* 1*s.* 8*d.* for value received by the defendant; and that the defendant, at *Dublin* aforesaid, duly accepted it. Plea, general issue. At the trial at the sittings after last *Trinity* term, before *Abbott J.*, it appeared

been drawn in *England* for *English* money; and therefore proof of a bill drawn at *Dublin* in *Ireland* for the same sum in *Irish* money, which differs in value from *English* money, did not support the declaration, and that this was a fatal variance. Held also, the bill having been drawn for a certain sum *sterling*, that the omission of the word *sterling* in the declaration was immaterial.

The declaration stated that a bill of exchange was drawn and accepted at *Dublin*, to wit, at *Westminster*, &c. for a certain sum therein mentioned, without alleging it to be at *Dublin* in *Ireland*: Held that the bill upon this declaration must be taken to have

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that the bill was drawn in *Ireland*, and was as follows, "*Dublin, May 1st, 1816. Eight months after date, please to pay to our order, the sum of 542l. 1s. 8d. sterling, for value received, by furniture delivered at Belvidere, by Egges and Power.*" It appeared also that 542l. 1s. 8d. *Irish* currency was of the value of 500l. 7s. 9d. *English* money. On these facts being proved, *Topping* for the defendant contended, that the plaintiff ought to be non-suited on the ground of variance; for, first, the declaration appeared to be for *English* money, whereas the bill produced was for the same amount in *Irish* currency; and, secondly, the word "sterling" was omitted. The learned Judge overruled the objection, but reserved the point; and in last *Michaelmas* term *Topping* moved for a nonsuit upon this ground, against which rule, in the present term,

Marryatt and *Littledale* shewed cause. They contended that the declaration was sufficient. With respect to the first objection, it is quite clear that the bill is accurately set out; for it is in the same words and letters as the original; and the only question that could be made at the trial, was whether the plaintiff had proved the instrument as it was set out. Now he does prove it by producing a bill in the same words. Besides, the bill is stated to be drawn at *Dublin*, the fair inference from which is, that it was drawn at *Dublin* in *Ireland*. And the case of *Simmons v. Parminter* (a) is an authority to shew that it was not necessary in the declaration to aver the value of the *Irish* currency in *English* money. Then as to the second objection, the same omission of the word *sterling* existed in *Glossop v. Jacob* (b), and was overruled by Lord *Ellenborough*.

(a) 1 *Wils.* 188.(b) 1 *Starkie*, 69.*Topping*

Topping and *E. Lawes*, contrà, were stopped by the Court.

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ABBOTT C. J. The Court do not think that the omission of the word *sterling* is material; but the difficulty in this case is to see how this declaration can apply to the case of a bill drawn in *Ireland* for *Irish* money, when it appears on the face of the record, that it is drawn for *English* money; for I do not see how an *English* jury in an *English* court of justice, reading the words of this declaration without any averment contained in it, to shew that the bill was not drawn in *England*, could come to any other conclusion than that the bill was drawn for *English* money. It is said that the bill is stated to have been drawn at *Dublin*, but it is not possible for the Court to take judicial notice that there is only one *Dublin* in the world. Let us suppose, that instead of *Dublin*, the bill had been said to have been drawn at *St. Germain's*, would it have been sufficient in order to support such a declaration, to give in evidence, not a bill drawn at *St. Germain's*, in *Cornwall*, but one drawn at *St. Germain's*, in *France*, for 542 livres, 1 sous, and 8 deniers? undoubtedly it would not. Then what is the case here? The bill produced to support this declaration is of 542*l.* 1*s.* 8*d.* *Irish* currency, which differs in value from *English*. The bill, therefore, produced, differs from the bill stated in the declaration; and the variance is fatal.

BAYLEY J. The Court must see upon the face of the record that the bill was drawn in *Ireland*, and it cannot take notice judicially that a bill drawn at *Dublin* is drawn at *Dublin* in *Ireland*. The instrument,

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ment, it is said, is set out in the same words and letters as the bill produced. But that is not enough; for it must be set out the same in substance and in legal operation, which is not done here. The bill in the declaration is in substance and legal operation a bill for so much *English* money; and the bill, when produced, appears to be for the same amount *Irish* currency. There is, therefore, a fatal variance between the declaration and the proof.

HOLROYD J. The declaration in this case should have stated that the bill was drawn for *Irish* currency, or it should have contained such facts from whence the Court might draw that inference. Even if it had stated that the bill was drawn in *Ireland*, it perhaps might not be sufficient; but even that has not been done here. I am, therefore, of opinion, that this is a fatal variance, inasmuch as the real import of the bill has not been correctly stated in the declaration.

BEST J. The defendant in this case is entitled to a nonsuit, inasmuch as the plaintiff has given no evidence of the bill stated in the declaration; and the defendant is clearly warranted in saying, that he never promised to pay that bill. For from the evidence it appears, that he promised to pay, not that bill, but another, one-twelfth less in amount.

Judgment of nonsuit.

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CAMERON and Others, Assignees of LAING, a
Bankrupt, *against* SMITH and Others.

Monday,
Jan. 25th.

TROVER for certain goods and chattels, bills of exchange, &c. Plea, not guilty. At the trial before *Abbott J.* at the sittings after last *Trinity* term, the only question was, as to the bankruptcy of *Laing*. The petitioning creditor's debt was an acceptance by the bankrupt of a bill of exchange, drawn for 96*l.* 17*s.* 10*d.*, due on the 18th of *January*, 1810. This bill, together with the interest due upon it, up to the time of the act of bankruptcy, amounted, altogether, to 101*l.* 14*s.* 8*d.* At the trial, *Marryat* for the defendant contended, that the interest could not lawfully be added to the principal, so as to make a good petitioning creditor's debt. The learned judge overruled the objection, and the plaintiffs subsequently obtained a verdict.

Interest accruing before the act of bankruptcy cannot be added to the principal sum due on a bill of exchange, so as constitute a good petitioning creditor's debt, unless interest be specially made payable on the face of the bill.

Marryat, in *Michaelmas* term last, obtained a rule nisi for a new trial, and renewed his objection, on the ground, that interest was no part of the debt, but only in the nature of damages, and he cited *Hume v. Peploe* (a); and now,

Scarlett, *Gurney*, and *Barrow* shewed cause. The distinction is, that interest accruing before the act of bankruptcy shall be allowed to form part of the petitioning creditors' debt, but not that which accrues afterwards. Interest, by the general usage of merchants, is

(a) 8 *East*, 168.

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given upon bills of exchange; and that usage forms part of every contract of this description. If the bill in this case had been to pay 96*l.* 17*s.* 10*d.*, with interest, there would be no doubt on the point. For it was decided, by the cases of *Herries v. Jamieson* (a), that debt would lie for interest. Then, if debt will lie for it, it cannot be contended with success, that it will not form a part of a valid petitioning creditor's debt. It is upon this principle, that the court of error allows interest upon bills of exchange. Besides, interest, as appears from the precedents, is allowed by the commissioners of bankrupts in these cases.

Marryat and Littledale, contra. In the case cited, the interest is part of the contract, and is expressly stipulated for by the parties at the time. It is then calculated according to the contract, and not awarded, as here, as damages for the breach of it. The calculation of the interest, up to the date of the commission, will be found to exist only in those cases where the securities specify that interest shall be paid. In all other cases, it is the uniform rule of the commissioners not to allow interest. It is clear, that damages cannot form a good petitioning creditor's debt: as, for instance, if a man have a good ground of action for damages against the bankrupt, for a libel, he cannot, till after he has obtained judgment, prove the amount of those damages under the commission. Interest is here of the same nature; it is the compensation in damages for the breach of the contract to pay the note. The rate at which it is to be paid is to be ascertained by the jury;

(a) 5 Term Rep. 553.

and

and cases may occur, in which the jury would give no interest at all. In *Ex parte Marlar* (a) Lord Hardwicke took the distinction between contracts which express, and those which do not express interest; and decided, that the commissioners ought to allow interest in the former, but not in the latter case. As to the allowance of interest in the court of error, that is done under the provisions of 3 *Hen. 7. c. 10.*, which gives the Court the power to award damages at their discretion. But this very case has lately come before the Court of Common Pleas, in the late case *Ex parte Burgess*, sent by the Lord Chancellor for their opinion; and they were of opinion, that the interest could not be added to the principal, so as to form together a valid petitioning creditor's debt.

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ABBOTT C. J. The distinction which has been pointed out in the argument, between the cases where interest is reserved, on the face of the bill itself, and those where it is not, had not at first occurred to my mind. I find, however, that the distinction has been recognized by Lord Hardwicke, in the case *Ex parte Marlar* (b); and the reason there given is, that where interest is not expressed in the body of the note, the jury on the trial do not give the plaintiff interest, but by way of damages only; and, therefore, that as commissioners of bankrupt cannot award damages, they cannot allow such creditors to prove for the interest due upon the notes. The rule laid down in that case has been ever since followed in practice; and the result is, that where a creditor is possessed of a bill,

(a) 1 *Atk.* 151.(b) *Ibid.*

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which does not express interest in the body of it, he is only allowed by the commissioners to prove for the principal money. The question, too, has been very recently before the Court of Common Pleas; and that court expressly decided, that the interest ought not to be added to the principal, to make a good petitioning creditor's debt. That case is precisely in point; and, upon these authorities, I am quite satisfied that this is not a good petitioning creditor's debt, and that this commission, cannot be supported. There must, therefore, be a new trial.

BAYLEY J. I am of the same opinion. The first impression on my mind was, that the interest might be added to the principal to make a good petitioning creditor's debt; but, upon further consideration, I am quite satisfied, that the distinction is between those cases where there is an express undertaking by the party to pay both principal and interest, and those where he undertakes to pay the principal only. In the latter case, the interest is no part of the debt, but only in the nature of damages. The case of a bond is different; for there the penalty is the debt, and the principal money due, and the interest thereon, may be considered as part of the penalty. Although by the usage of trade interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury, in order that they may find the amount; and it is competent for them either to allow five per cent. or four per cent., according to their judgment of the value of money, or they may even allow nothing, in case they are of opinion, that the delay of payment has been occasioned by the default of the holder.

holder. These circumstances shew, that interest is in the nature of damages, and is no part of the debt. The practice in Chancery, established in the case before Lord *Hardwicke*, is conformable to this view of the subject; and cases upon this point are there matters of daily occurrence. If the interest constitute part of the debt, the Chancellor cannot refuse to allow the holders to prove for it; for he cannot distinguish between one part of the debt and another. Yet we find, that a distinction between principal and interest is continually made. It must, therefore, have a legal foundation, and that foundation is, that the principal is, in point of law, the debt, and the interest only in the nature of damages; and that as the commissioners of bankrupt are only to receive proof of debts, they cannot allow anything to be proved, which does not constitute part of the debt. I am, therefore, of opinion, that the interest cannot be added to the principal, so as to make this a good petitioning creditor's debt.

HOLROYD J. I am of the same opinion. It appears to me quite sufficient to decide this case, that the point was settled so long ago by Lord *Hardwicke*, whose decision has been acted upon ever since; but even if this were *res integra*, I should think the principle of that decision right. Where the interest is expressly agreed to be paid, it may be considered as part of one aggregate debt; but where a specified sum only is agreed to be paid, there interest is recoverable as damages, and it may depend upon external circumstances, whether any and what interest is to be recovered. The commissioners of bankrupt cannot enquire into those circumstances, and, therefore, it is not competent for them to

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allow interest at all. There was, therefore, no good petitioning creditor's debt in this case.

BEST J. I should have felt myself bound to have decided this case, upon the authority of the case 'before Lord *Hardwicke*, and that lately determined by the Court of Common Pleas; but I am satisfied, independently of those authorities, with the propriety of the distinction between the cases where there is an express stipulation for interest and those where there is none. In the latter the amount of interest is uncertain, and being like any other unliquidated damages, cannot be considered as part of the debt due on the bill. There must, therefore, be a new trial in this case.

Rule absolute.

Tuesday,
Jan. 26th.

DIXON and Another, Assignees of DAVIDSON, a
Bankrupt, *against* HAMOND.

An agent cannot dispute the title of his principal; and therefore where a ship originally belonged to one of two partners, and had been conveyed to *B.* for securing a debt, and *B.* became the sole registered

owner of the ship, and afterwards, *as agent for both partners*, insured the ship and freight, and charged them with the premiums, &c.; and, on a loss happening, received the money from the underwriters: Held that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged.

ASSUMPSIT for money had and received. Plea, general issue. At the trial at the *Guildhall* sittings after last *Michaelmas* term, before *Abbott C. J.*, it appeared that the bankrupt *Davidson* was the surviving partner of one *Flowerden*, and that *Flowerden* being possessed of a ship called the *Sidney*, had in 1814 assigned her over to one *Hart*, as security for the

advance

advance of 1000*l.*, and the ship was accordingly registered in his name. Subsequently to this, *Hamond*, the defendant, advanced to *Flowerden* the sum of 900*l.* for the purpose of paying off *Hart's* debt, and his name was then substituted in the certificate of registry, for that of *Hart*, for the purpose of securing this debt. On the 3d of *January*, 1815, the defendant, who was an insurance broker, effected an insurance as agent for *Flowerden* and *Davidson*, on the ship and her freight to the amount of 2800*l.*, and he charged *them* with the premiums of insurance. The ship having been lost in her return home, the underwriters paid the loss to the defendant as the agent of *Flowerden* and *Davidson*, for whom the policy had been effected. The action was brought to recover back from the defendant the sum of 1900*l.*, being the difference between the sum of 2800*l.* received, and the sum of 900*l.* which he had advanced on the security of the ship. *Scarlett*, at the trial, contended, that the defendant was not liable at all, being himself the sole registered owner of the ship, and that therefore the assignees had no title to it. And, secondly, that if he was accountable at all for the surplus of 1900*l.*, he was so only to the executors of *Flowerden*, to whom the ship originally belonged. The learned Judge overruled both these objections, and the plaintiffs obtained a verdict. And now

Scarlett moved for a new trial. Here, by a regular assignment, the defendant is owner of the ship, and has the only legal title to it. Then what title can the assignees of *Davidson* have to it? Their only right to this money arises from their being the legal owners of

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the ship, and it would therefore follow, that not being so, they have no title by which they can claim this money. And their only remedy will be, if they have any, by going into a court of equity. But even supposing that the defendant only holds this money as security for his debt of 900*l.*, and that he is accountable for the surplus, it is clear that he is not accountable to these persons. For the ship never was the property of the partnership at all: she originally belonged to *Flowerden* alone; and, therefore, it is to his representatives that the defendant is, if at all, accountable. Then will the accounting with the partnership for the premiums, &c. make any difference? Suppose a borrower gives a mortgage on another person's land as a security, and the mortgagee in possession were to account with the mortgagor, and pay over to him the surplus rents, could it be said that afterwards, on the estate being sold, the mortgagee was bound by that to pay the surplus to the mortgagor, and not to the real proprietor? Here, therefore, *Hamond* is mortgagee in possession; the ship is sold; and he must be accountable to the representatives of the real owner *Flowerden*, and not to the assignees of *Davidson*, who never had any real title whatever to the ship. This action, therefore, cannot be maintained.

ABBOTT C. J. If, in order to maintain this action, it were necessary to shew that the legal title to this ship was in the present plaintiffs, there could be no doubt that the defendant would be entitled to our judgment. For it is clear that the ship never belonged to the partnership at all. It was originally the property of *Flowerden* alone, and by him the legal interest was
 first

first transferred to *Hart*, and subsequently vested in the present defendant. He, however, in 1815 receives an order to effect an insurance on the ship and freight on the partnership account, and he does effect it, and accounts with the partnership for the premiums. After this, the ship is lost, and he receives the money from the underwriters. Then, in truth, the legal title to the ship has nothing to do with this question. The right of the plaintiffs to recover here depends on a settled rule of law, that an agent shall not be allowed to dispute the title of his principal, and that he shall not, after accounting with his principal, and receiving the money in that capacity, afterwards say, that he did not do so, and did not receive it for the benefit of his principal, but for that of some other person. Here the defendant has received the money as agent for the partnership, and he cannot now be permitted to say, that he received it for the benefit of *Flowerden* alone. All the rest of the world, except the defendant, might dispute the legal title of the plaintiffs to the ship, but he cannot do it. There is, therefore, no reason for granting this rule.

BAYLEY J. The case only depends on the peculiar relation between principal and agent. *Hamond* here has effected an insurance for both *Flowerden* and *Davidson*, and the loss having happened, the underwriters have paid it to him as the agent of both partners; then he must pay it over, according to his duty as agent, viz. to the partnership; and he is not at liberty now to say, I will not do so, but I will pay it to *Flowerden* alone. The verdict therefore is right.

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HOLROYD J. This case ought to be considered exactly in the same way as if some third person, and not *Hamond* himself, were the registered owner of the ship; and then there could be no doubt. Besides, if the underwriters had paid the money to *Flowerden* and *Davidson* themselves, it is quite clear, under the circumstances of this case, that *Hamond* could not then have recovered it from them. Then if so, that shews that the money, though paid to him, was not his money, but that of the partnership, and that, therefore, this action to recover it may be supported against him by the present plaintiffs.

BEST J. concurred.

Rule refused.

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Jan. 26th.

Ex parte CLARKE.

An attorney, who had not practised on his own account since his last certificate expired, may be re-admitted without paying any fine or arrears of duty.

MARRYAT moved, to re-admit an attorney. It appeared that he was originally admitted in the year 1801, and had regularly taken out his certificate till 1804; and that from that time until the month of *June* last, he had acted as clerk to another attorney, and had not in the interval ever practised on his own account. The only question was, on what terms the re-admission should take place. It was urged, that as no duty had accrued due in the interim, the payment of arrears of duty since the expiration of the last certificate should not be made a condition of the rule. The Court, after consulting the master, directed the rule to be drawn up as prayed, and the rule was accordingly drawn up, to re-admit him on his taking out the certificate

cate to practise, and on payment of the duty for the present year, without any arrears of duty or fine. (a)

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(a) *Monday, June 8th, 1818.* Ex parte CALLAND, *Trin. term, 1818.* G. R. Cross having moved to re-admit *Charles Calland* as an attorney, who had been struck off the roll at his own desire, fifteen years before, and had not practised in any way since; the Court directed him to be re-admitted on payment of the *arrears of duty* and penalty of 20s. Cross afterwards applied to the Court to have the rule amended by striking out the term upon payment of arrears of duty and penalty, on the ground that the 37 G.3. c. 90. s. 31. confined the payment of arrears to such attornies only who had *neglected* to take out their certificate, and who had thereby been off the roll; and not to attornies who had been struck off the roll on their own motion. And *Bayley* and *Holroyd Js.* (the only Judges present), upon looking into the act, agreed that that was the correct construction of it, and ordered the rule to be amended accordingly.

FLETCHER *against* INGLIS.

Tuesday,
Jan. 26th.

ACTION on a policy of insurance, dated the 16th *October, 1813*, on ship, at and from any port or ports, place or places, in port, at sea, in government service for twelve calendar months, commencing on the 17th *October, 1813*, and ending on the 16th *October, 1814*; warranted free of capture and seizure, at a premium of 9l. per cent. for the twelve months, to return 14s. 3d. for every uncommenced month, if captured or discharged the service. The loss was averred to be by perils of the sea. At the trial before *Abbott C. J.* at the last *London* sittings, it appeared, that the ship insured was a transport engaged in the service of government, and that in the course of such service, and within the term mentioned in the policy, she was ordered into *Boulogne*; where, under the direction of the superintendant of transports, she was moored near one of the quays. The harbour of *Boulogne* is a dry harbour,

A transport in government service was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was hard and uneven, and on the tide having left her, she received damage by taking the ground: Held that this was a loss by a peril of the sea.

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harbour, with a hard uneven bottom. Between nine and ten at night, the tide having then left the vessel, a cracking noise was heard in the ship, proceeding, as the witness believed, from something breaking. Some time after this, on the return of the tide, there was a considerable swell in the harbour, and the ship struck the ground hard several times: in the morning, 18 of the knees were found to be broken. It was proved, that the ship had frequently struck in other soft harbours, without receiving any damage: but at those times she was waterborne. This action was brought to recover the amount of the expense incurred by the assured in repairing this damage. The jury found a verdict for the plaintiff; and now,

Scarlett moved for a new trial. This was an insurance upon a vessel engaged as a transport, in the service of government. In the regular course of the duty required of such a vessel, it must become necessary to put into dry harbours, and to take the ground. Any injury arising from her taking the ground, under such circumstances, is, therefore, part of the ordinary wear and tear of the vessel: it does not arise from any extraordinary accident, and is not therefore a peril of the sea; and he cited *Thomson v. Whitmore (a)*, where a transport having been hove down upon a beach to repair, was there bilged: it was held, that that was not a peril of the sea.

ABBOTT C. J. said that the Court would consider the case; and after an interval of a few days, he stated that the Court had considered it, and that they thought it was a loss by a peril of the sea; and accordingly the rule was refused.

(a) 3 Taunt. 227.

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JACKSON *against* HALLAM.Wednesday,
Jan. 27th.

TRESPASS for pulling down a wall. Plea, not guilty. At the trial before the Lord Chief Baron, at the *Nottingham* Spring assizes, 1817, the defence was, that the defendant had pulled down the wall, as surveyor, under the 13 G. 3. c. 78.; but the Lord Chief Baron was of opinion, that the defendant could not avail himself of that defence, as he had not given the notices required by the act. A rule nisi for a new trial was obtained, on the ground of the misdirection of the learned Judge, which rule was afterwards made absolute; but nothing was said *as to the costs of the trial*. Notice of trial was then given for the ensuing assizes, but the defendant subsequently obtained a judge's order for leave to withdraw his plea, suffered judgment by default, and gave a cognovit for 35*l.* damages, and such costs as the plaintiff was by law entitled to recover. Upon taxing the costs, the Master refused to allow the plaintiff the costs of the trial. A rule nisi having been obtained in last term, for the Master to review his taxation,

Plaintiff having obtained a verdict, the Court, on the application of the defendant, granted a new trial, on the ground that the Judge had misdirected the jury in point of law; but the rule for the new trial was silent as to costs. The defendant, without going to trial, gave the plaintiff a cognovit; and the Court held that the defendant was liable to pay the costs of the trial.

Denman now shewed cause, and contended, that in this court, the rule was, as laid down by Lord *Kenyon*, in *Bird v. Appleton* (a), where all the former authorities were considered, that the costs of the first trial shall not be allowed, though the verdict has gone the same way, unless it be so expressed in the rule granting the

(a) 1 *East*, 111.

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new trial ; and if the rule be silent in that respect, the costs of the first trial are never allowed, whichever way the verdict may go upon the second trial. Here, therefore, if the cause had gone down to trial the second time, the plaintiff could not, even if he had succeeded, have had the costs of the first trial ; and the defendant is not to be put in a worse situation here, by having given a cognovit, than if he had gone down to trial, and a verdict had been found against him. And he cited *Howorth v. Samuel*. (a)

Hullock Serjt, contra, relied upon *Booth v. Atherton* (b), where, after argument on a special case, the Court directed a new trial, because the case was insufficiently stated ; and the defendant, without going to trial again, gave the plaintiff a cognovit. There the Court held, that the defendant was liable to pay the costs of the former trial. That case was recognized by Lord Kenyon, in *Bird v. Appleton*, and is precisely in point with the present.

ABBOTT C. J. I think, that the plaintiff is entitled to the costs of the trial. The rule for the new trial was silent as to costs ; and if the plaintiff had obtained a verdict on the second trial, he would only have been entitled to the costs of that trial. Instead, however, of taking the benefit of a second trial, the defendant has acknowledged, by giving a cognovit, that he had no ground of defence to the action ; and that the first verdict was right upon the merits. It seems to me, therefore, that in point of justice, he ought to pay the

(a) 1 Barn. & Al. 566.

(b) 6 Term Rep. 144.

costs of the trial; and *Booth v. Atherton* is an authority to shew that such is the rule of law.

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against
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BAYLEY J. The case of *Booth v. Atherton* is the only case precisely in point. That case establishes a distinction between those cases, where there is and where there is not a second trial. In the latter, the costs of the first trial are to be paid by the party who does not succeed. Here the defendant, by giving the cognovit, has shewn, that his application to set aside the verdict was unfounded; and if the verdict had stood, as it ought to have done, he must have paid the costs of the trial.

HOLROYD J. I am of the same opinion. The rule laid down in *Booth v. Atherton* is applicable to the present case; and it is most consistent with justice, that the plaintiff should have the costs of the trial. The defendant resisted the action, on the ground, that he acted in his character of surveyor; and he applied for a new trial, because he was not permitted to enter upon that defence. The Court permitted him to defend himself in that character, and he then acknowledges that he has no such ground of defence. He has acknowledged, therefore, that if he had been permitted to go on with his defence at the first trial, the verdict must still have been found against him upon the merits; and he must, therefore, at all events, have paid the costs of that trial.

BEST J. concurred.

Rule absolute.

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Wednesday,
Jan. 27th.

WEIR against ABERDEEN.

A ship insured at and from a port, sails on her voyage in an unseaworthy state, in consequence of having a greater cargo than she could safely carry. The defect is discovered before any loss accrued, and part of the cargo is discharged, and a loss subsequently accrues, in no degree attributable to her having been overladen in the early part of her voyage: Held that the underwriters were liable for such loss.

The vessel having sailed and put back to the *Downs*, and then sailed again, and laboured and strained much from being overloaded, and then put back a second time; and upon an application to the underwriters for liberty for the ship to go into port to discharge part of the cargo, it was only communicated to them that the ship was too deep in the water: Held that as the subsequent loss had not in any degree arisen from her having so strained and laboured, the communication of that fact was immaterial, and that the communication made was quite sufficient. Held, also, that the memorandum giving such liberty did not require a new stamp.

ACTION upon a policy of insurance, dated the 21st *February*, 1817, on the ship called *Prince Cobourg*, and her outfit at and from *London* to *Bahia*; and the declaration stated that the following memorandum of the 5th *April*, 1817, was indorsed upon the policy. It is agreed, that the *Prince Cobourg* may load, unload, and reload goods, and discharge part of her cargo at *Ramsgate*. Plea, non-assumpsit. At the trial before *Best J.* at the last *London* sittings, it appeared that the plaintiff was both owner and captain of the ship; that he sailed in her from *London* on her voyage on the 18th *March*, laden with iron, and that between *Dungeness* and *Beachy Head* she laboured so much, that it became necessary to put back to the *Downs*, from whence she sailed again on the 27th, that on the 28th the vessel still laboured and strained much, and made water, and on the 29th she still strained and made such bad weather from being overladen, that it became necessary for the preservation of the cargo, &c. to bear up for the *Downs*, where she arrived on the 30th, when the captain made a protest, and came up to *London* to consult with the charterer as to the propriety of unloading part of the cargo. On his arrival in *London*, he informed his insurance broker, that it would be necessary to put into some port to unload part of the cargo, and directed him to apply to the underwriters for liberty so to do. The broker did

apply

apply to the underwriters, and the memorandum stated in the policy was signed by the defendant; he did inform them of the circumstance of the ship being too deeply laden to continue her voyage with safety, but he did not state to them that the ship had put back from *Beachy Head*, or that she had strained much, or that any protest had been made. The plaintiff on his return to *Deal* had the ship surveyed, and under the advice of the surveyors, that it was necessary to lighten her, he put into *Ramsgate* harbour, unshipped part of the cargo, and afterwards proceeded on the voyage insured, in the course of which a loss took place. It was objected on the part of the defendant, that the ship having been overladen, was unseaworthy at the commencement of her voyage, and that the memorandum was invalid, both from not having a new stamp, and also from having been obtained without making a due communication to the underwriters. The learned Judge, however, was of opinion, that this being a policy on ship, the risk had commenced before any goods had been laden; and he left two questions to the jury, first, whether, when she sailed from *Ramsgate*, she was properly laden, and in a seaworthy state; and, secondly, whether the subsequent loss had been occasioned by the circumstance of the vessel having been overladen between *London* and *Ramsgate*. The jury found that when the ship sailed from *Ramsgate* she was not improperly laden, but was then in a seaworthy state; and that the subsequent loss was not in any degree attributable to the circumstance of her being overladen between *London* and *Ramsgate*; and upon this finding, a verdict was entered for the plaintiff.

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Gurney now moved for a new trial, on two grounds, first, that the vessel having been overladen when she commenced her voyage, was not seaworthy, inasmuch as the sailing of the vessel in a seaworthy state is a condition precedent to the vesting of any right in the assured to recover; and the underwriters at least are not liable for any subsequent loss, unless that condition be fulfilled: and he referred to a case of *Oliverson v. Loughnan* (a), which he stated to have been an insurance upon a ship at *New Orleans*, where she lay a considerable time upon the mud, during which time her bottom was injured by worms; while she lay upon the mud, no defect was apparent, but when she commenced her voyage, and came down the river, the defect was discovered; and Lord *Ellenborough* held, that the vessel might be in a seaworthy state on the mud and in the river, but that if she had got out of the river, the underwriters would have been off the policy. The defect, however, having been discovered before she got out of the river where she was in a seaworthy state, he held that the underwriters were not off the policy, because she did not get into a state of weather in which she would be unseaworthy. Secondly, supposing the policy to have attached, the putting into *Ramsgate* harbour was a deviation; for the memorandum could not avail the plaintiff, inasmuch as it operated as a new policy, and therefore required a new stamp, and the liberty there given was obtained from the underwriters, without having disclosed the important fact that the vessel had strained much, owing to her having been overladen, or that a protest had been made.

(a) *Sittings after Trinity term 1815.* The case is reported, upon another point, 4 *Maule & Selw.* 346.

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ABBOTT C. J. It appears in this case that the vessel, at the time of her departure, was not in a fit condition to perform her voyage, in consequence of her having at that time a greater cargo than she could conveniently, or perhaps with safety, convey. The master having discovered this, and having met with bad weather, (which was perhaps the cause of the discovery being ever made,) put back into the Downs, and having obtained permission to go into *Ramsgate* for the purpose of discharging part of her cargo, went there and did land some portion, and so having removed the objection that had previously existed, put the ship into a fit condition to perform the voyage. And the jury have found that the loss which subsequently happened was in no degree attributable to the condition in which she originally sailed; and from which she had freed herself by discharging part of her cargo at *Ramsgate*. But it is said, that this memorandum expressing the consent of the underwriters is void, and that in order to bind the underwriters a new contract was necessary, inasmuch as the fact of the vessel having once sailed with a cargo greater than was proper for that voyage, and therefore in an unseaworthy state, wholly put an end to their liability on the policy. That proposition would go the length of establishing, that if a vessel, at the outset of her voyage, be by mistake or accident unseaworthy, owing to some defect which is immediately discovered, and remedied before any loss happens in consequence of it, still that the policy would be void, and the underwriters not liable. I confess that I was a little surprized at that proposition, because, if true in point of law, I fear we should find many cases indeed, where it would turn out that the assured could have no claim upon the underwriters,

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because something was wanting, or something excessive, at the instant of the ship's departure, although the want had been supplied, or the excess removed before the loss happened. Suppose, for instance, a vessel is unseaworthy, unless she has two anchors, being destined for a long voyage, and she sails from *London* to *Gravesend*, with only one, shall it be said, that if no loss happens between *London* and *Gravesend*, and the vessel at *Gravesend* takes on board her second anchor, and then proceeds on her voyage, that the underwriters are not liable for a subsequent loss, and that the policy is so completely at an end, that even if the underwriters agree to waive the objection, and to allow her to proceed on her voyage, their consent shall be unavailing. These inconveniences, which would be continually occurring in practice, would lead to dangerous consequences, by opening a door to underwriters to break their engagements by means of trivial circumstances, the effect of which no one ever contemplated. I think, therefore, that that proposition cannot be maintained. As to the objection that this was a deviation, it is sufficient to answer, that it was done by the permission of the underwriters. With respect to the sufficiency of the communication made to them, it is quite clear, that the underwriters were told all that was in substance necessary for them to know; for they were told, that when the vessel sailed she had too large a cargo on board, and that she was not in a situation fit to perform her voyage. Upon the whole, therefore, I think, this rule must be refused.

BAYLEY, J. I am of the same opinion. There was not any fraud or concealment in this case, so as to vacate

vacate the memorandum; for it distinctly appears, that the underwriters were told, that the ship had been overloaded, and that, from that circumstance, she was in an unseaworthy state. As to the fact relied upon, that the ship had strained, it is to be observed, that if that straining had rendered her unseaworthy, the non-communication of that fact would have vacated the policy; but as the jury have negatived that, the fact was immaterial, and therefore it was unnecessary to communicate it to the underwriters. The question then is, whether the memorandum required a new stamp; and the case of *Hubbard v. Jackson* (a) is an authority to shew, that a warranty may be waived by a memorandum on the policy without a new stamp. Now it is a warranty that the ship shall be seaworthy, and therefore it does not require a memorandum with a new stamp, in order to waive it. A warranty to sail within a certain time is of the same nature; and yet it has been held, that after the period when the condition has terminated, the parties may still, by an unstamped memorandum, continue the policy; and if they may do so in one case, they may do so equally in the other. It has been said, that the memorandum here was added after the determination of the risk by the original sailing of the ship in an unseaworthy state; but that depends upon a misconstruction of the words "determination of the risk insured." Upon this point, it will be sufficient to advert to the language of the Court in *Kensington v. Inglis*. (b) There the insurance was on goods on board ships which should sail before the 1st of *June*, and the memorandum enlarging

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(a) 4 Taunt. 174.

(b) 8 East, 291.

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the time of sailing to the 1st of *August* was not added till the 11th of *June*; and the objection was there taken as here, that the risk had then determined. But Lord *Ellenborough* said, "that the objection was founded on a misapplication of the terms *determination of the risk insured*, which means that determination of it which is occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage; and that it was sufficient that the memorandum was written on the policy before any of these events happened." On these grounds I am of opinion, that the memorandum, in this case, did not require a new stamp, and that the verdict is right.

HOLROYD J. I am of the same opinion. I do not think that the overloading in this case, which rendered the ship unseaworthy at the time of her sailing, made an end of the policy. The inconveniences which have been pointed out, as resulting from this, induce me to think that such a proposition is contrary to law: no authority has been cited in support of it; and unless some cogent authority were produced, I should not accede to it. It appears to me, that the risk continued to the term of the loss, and that the plaintiff is entitled to recover.

BEST J., who tried the case, concurred.

Rule refused.

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HORNBLOWER and Others *against* PROUD and Others.Friday,
Jan. 29th.

TROVER for three bills of exchange. Plea, not guilty. At the trial before *Abbott C. J.* at the *London* sittings after *Trinity* term, 1818, it appeared that the action was brought by the direction of the Vice Chancellor, for the purpose of trying an issue. The facts of the case were, that the plaintiffs on the 2d *March*, 1818, applied to *T. Gibbons and Co.*, bankers at *Wolverhampton*, to discount for them the three bills of exchange for which the action was brought, by giving them a bill of 903*l.* for the amount, on *Esdaile and Co.* bankers in *London*, payable two months after date, to the plaintiffs or their order. The three bills were accordingly indorsed over to *Gibbons and Co.*, who by the next post remitted them with many others to *Esdaile and Co.*, who placed them generally to the credit of *Gibbons and Co.* The bill given in exchange by *Gibbons and Co.* was refused acceptance by *Esdaile and Co.*, and on the plaintiff's applying at *Wolverhampton* to know why this had happened, *Gibbons and Co.* informed them that they had had some heavy advances to make, and had not advised *Esdaile and Co.* of the bill for 903*l.* drawn on them. The bill was afterwards presented a second time, and again refused acceptance. On the 16th of *March*, a commission of bankruptcy issued against *Gibbons and Co.*, under which they were duly declared bankrupts, and the defendants were appointed assignees, and the usual assignments made to them.

A person having three bills of exchange, applied to a country banker, with whom he had had no previous dealings, to give for them a bill on *London* of the same amount, and the bill given by the banker was afterwards dishonoured: Held that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange.

Held, also, that if the exchange had not been complete, still that the banker having become a bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy, within the statute of *James*.

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At the time of suing out the commission, *Gibbons* and Co. were indebted to *Esdaile* and Co. on the balance of accounts, but the latter then held several bills belonging to *Gibbons* and Co. besides the three bills in question, which were afterwards paid, and ultimately the balance due from *Esdaile* and Co. to the bankrupts exceeded the amount of 903*l*. The Vice Chancellor, on a bill having been filed by the plaintiffs, praying that the amount of the three bills in question might be paid to them out of this surplus, directed the action to be brought, and ordered that the defendants should admit that the said three several bills of exchange were in their possession at the time of the bankruptcy of the said bankrupts. There was no account between the plaintiffs and *Gibbons* and Co. previously or subsequently to this transaction. The learned Judge, under these circumstances, nonsuited the plaintiffs. *Marryat* in last *Michaelmas* term having obtained a rule nisi for setting aside this nonsuit,

Scarlett and *Tindal* shewed cause. The transaction is in this case a mere exchange of bills, and cannot be distinguished from an exchange of bills for goods. Then supposing a bankrupt purchases goods, and gives a bill for them, and the bill is dishonoured, the creditor cannot bring trover for the goods, but must prove for the amount under the commission. This appears to have been an insulated transaction, and there was no contract, that the bill given should be an accepted bill. Nor is there any fraud in the case; for it appears that there was in *Esdaile's* hands at the time sufficient property to make them secure, if they had

had accepted the bill; so that *Gibbons* might fairly expect that the bill would be accepted. But on the second ground the nonsuit is right, for these bills, as appears from the order of the Vice Chancellor, must be taken to have come to the possession of the defendants as assignees at the time of the bankruptcy. Then, if so, they fall within the operation of the statute of *James*, being goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy, with the consent of the real owner. In either way, therefore, the nonsuit is right.

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Marryat and *Lawes*, contra. There must be considered to be an implied contract in this case, that the bill given by *Gibbons* and Co. should be an accepted bill; for otherwise it would not be an exchange of valuable securities. If so, the bill being refused acceptance is altogether a nullity, and the transaction a nullity also, and the party may recover back in trover the bills he has given. *Bishop v. Shillito (a)*, and *Puck-*

(a) *Bishop v. Shillito*, Hil. term 59 G. 3. Trover for iron. The iron was to be delivered under a contract that certain bills outstanding against the plaintiff should be taken out of circulation. After a part of the iron had been delivered, and no bills had been taken out of circulation, the plaintiff stopped the farther delivery, and brought trover for what had been delivered. *Scarlett*, for defendant, contended that trover would not lie, and that the only remedy for the plaintiff was to bring an action for the breach of the contract by the defendant. But the Court held that this was only a conditional delivery, and the condition being broken, the plaintiff might bring trover. *Abbott* C. J. said he had left it to the jury to say, whether the delivery of the iron and the re-delivery of the bills, were to be contemporary, and that the jury found that fact in the affirmative; and *Bayley* J. added, that if a tradesman sold goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser.

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ford v. Maxwell (a) is applicable in principle to this case. But secondly, this transaction is void on the ground of fraud, for *Gibbons* and Co. do not advise their bankers in *London* of the bill having been drawn. They say they did not do it because they had had heavy advices to make; in other words, because they knew it would not be accepted. Then their taking these bills from the plaintiffs, and giving them another which they knew at the time was of no value, was fraudulent. And the dates corroborate this view of the case; for the bill was presented in *London* on 4th *March*, and the bankruptcy took place on the 16th; so that they must have been in a failing condition at the time. *Gladstone v. Hadwen.* (b) As to the statute of *James*, it has never yet been held, that a bill of exchange falls within the description of goods and chattels mentioned in that act. And in several cases before the Lord Chancellor it has been held, that short bills in a banker's possession at the time of his bankruptcy are not within the operation of the statute, *Ex parte Pcase and Others.* (c) Here *Gibbons* and Co. were bankers, and those cases are therefore in point.

ABBOTT C. J. I am of opinion that in this case the nonsuit was right. The case, on the facts admitted, appears to be, that *Gibbons* and Co., on the 2d of *March*, exchanged a bill drawn on *Esdaile* and Co. for the three bills in question, and I think that the property in the latter actually passed to them by this exchange of securities. For they were indorsed over to *Gibbons* and Co., who had the power of disposing of them

(a) 6 *Term Rep.* 52.(b) 1 *Maule & Selw.* 517.(c) 1 *Rose*, 232.

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for a valuable consideration, and in like manner the plaintiffs had a similar power over the bill which was given to them in exchange. It is, however, contended that the property did not pass immediately by the act of exchange, but that it was in abeyance till the exchanged bill had been accepted by *Esdaile* and Co. But if that were so, I do not see why it should not equally remain so until the bill was not merely accepted but also paid. That, however, would be quite inconsistent with the nature of the transaction. It has been urged that there was fraud in obtaining possession of the bills which will therefore vitiate the whole transaction. But I do not think that there was sufficient evidence from which to draw this conclusion. It does not follow that because *Gibbons* and Co. found that it was inconvenient to them to send advice to *Esdaile* and Co., of their having drawn the bill for 903*l.*, that they therefore knew, at the very instant when the exchange was made, that it was out of their power to advise of that fact with any probability that the bill would be honoured. It is possible that subsequently to the exchange being made they might discover their situation, and if so, there is no sufficient fraud to vitiate the transaction: if, however, that ground was to be relied upon, it ought to have been presented to the jury by a distinct issue upon that fact. But, supposing that the exchange in this case was not an absolute transfer of the property, still these bills, being negotiable securities of which the bankrupts might dispose, and having remained in their possession (for so we must take the fact to be in this case) till the time of the bankruptcy, and so come to their assignees, are in my opinion within the operation of the statute of *James*. It has been held, that debts are within that statute; if

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so, à fortiori bills of exchange must be so. The cases which have been cited, as having been determined before the Chancellor, are very distinguishable. There bills deposited by a customer with a banker were held not to be within the statute; but the banker, in such a case, is in the nature of a trustee, and the authority only proves that trust-property is not within the statute. In this case, it appears, that after the bill for 903*l.* was refused acceptance the plaintiffs never demanded to have their bills returned. That fact, therefore, shews that they, at all events, permitted those instruments to remain in the order and disposition of the bankrupt. For these reasons, I am of opinion, that even supposing the property not to have been actually transferred by the exchange of securities, still that, at all events, the three bills fall within the operation of the statute of *James*, and therefore the nonsuit was right.

BAYLEY J. I am of opinion that in this case the property in the three bills was never in the plaintiff after the 2d of *March*; that bills of exchange are within the statute of *James*, subject only to this exception where they are in the hands of known trustees; and that these bills were in the hands of *Gibbons* and Co., not as trustees, and that they had the order and disposition of them at the time of their bankruptcy. It appears that the exchange of bills took place on the 2d of *March* without any pre-existing debt between the parties. Now, if instead of an exchange of securities the plaintiffs had given goods for the bill upon *Esdaile*, there is no doubt that the property in the goods would have passed by the exchange, and that if the defendants

had

had sold the goods to a third person, the plaintiffs, in case the bill had not been accepted, could not have maintained trover against the vendee on the ground of the supposed fraud. But if no property passed by the transaction, no doubt the plaintiffs would have been entitled to maintain that action, unless the sale had been in market overt. Then, as there is no substantial difference between that case and the present, it seems to follow that trover will not lie for the bills in question. There is another reason to shew that the property in this case passed absolutely by the exchange. If there had been an implied condition that the bill given in exchange should be an accepted bill, it was the duty of the plaintiffs to have presented it for acceptance, and upon refusal to have immediately rescinded the contract. But that was not done: they made no demand to have their three bills restored to them, nor took any step in the matter. I think, therefore, that the property passed by the exchange. The next question arises on the statute of *James*, which does not apply unless the property be in the order and disposition of the bankrupt at the time of his bankruptcy. In this case, the bills in question were in the possession of *Esdaile* and Co. at that period, who held them because they had a lien upon them. It turned out, however, ultimately, that on the accounts between them being adjusted, the balance, independently of these bills, was in favour of the bankrupts. We must, therefore, consider, in this case, *Esdaile* and Co. as having been ab origine trustees of these bills for the bankrupts, and that their possession was the possession of the bankrupts. Then the bankrupts had, in point of law, the order and disposition of them at the time of their bankruptcy, and they not only might, but actually did,

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did, acquire credit upon them. Now bills of exchange, as it appears to me, are goods and chattels within the meaning of the statute of *James*. It has been decided that debts are within it, and if so, no good reason can be assigned why the statute should not apply generally to all choses in action. The cases cited from Chancery are, upon the grounds stated by my Lord C. J., clearly distinguishable from the present. I think, therefore, that this rule should be discharged.

HOLROYD J. I think that in this case, by the exchange of securities, an absolute and not a conditional exchange of property took place; and that the only effect of the non-acceptance of the bill upon *Esdaile* is to remit the party to his remedy by action, but not to revest in him the property that has passed by the exchange. There is nothing in this case which distinctly shews fraud so as to vitiate the transaction; for, in order to do that, it must appear, that the party, at the very time of the exchange, knew that the bill which he drew would be dishonoured: but that does not seem clearly to be the case here. I am also of opinion, that this is a case within the statute of *James*. No case can be cited to shew, that bills of exchange are not within the act. I am most clearly of opinion, that they are both within the words and the mischief contemplated by the legislature, and therefore that the nonsuit was right.

BEST J. I have no doubt on either of the points in this case. I think that the property passed absolutely by the exchange of securities. The case of *Bishop v. Shillito* was decided on the ground that the iron
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there was delivered on the express condition that certain bills should be returned, which not having been done, it was held, that trover would lie for the iron. But this case is very different, and is rather like the case of goods sold on credit, where the property passes on delivery. I think also, that this case falls within the statute of *James*. The cases cited from Chancery seem to me to be authorities in favour of this position; for they turn expressly on the mode in which the bills of exchange came into the possession of the bankers. Now that consideration was wholly unnecessary, unless it had been admitted law that bills of exchange per se were within the words of the act. Those words are "goods and chattels," which means all personal property, the title to which is evidenced by possession. I think, therefore, that the nonsuit was right.

Rule discharged.

WICKES *against* GORDON.

Friday,
Jan. 29th.

ACTION on the stockjobbing act, 7 G. 2. c. 8. s. 8. for penalties. The declaration stated a contract of the 20th *January*, 1817, for the transfer of 5000 consols, on the 27th *February* then next. Plea, nil debet. At the trial before *Abbott C. J.*, at the *London* sittings, after *Trinity* term, 1817, the broker, who was called as a witness to prove the contract, stated at first, on his examination in chief, that the contract was for the transfer of stock on the 27th *February*. On cross-examination, however, he said, he could not positively

The contract laid in the declaration was to deliver stock on the 27th of *February*. The contract proved was to deliver stock on the settling day, which, at the time, was fixed for, and understood by the parties to mean, the 27th of *February*: Held that the proof supported the declaration.

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say that the 27th *February* was expressly mentioned. But if it was not mentioned, the day mentioned was the *settling day*, which at the time of the contract was already fixed for the 27th *February*, and that it was perfectly understood between the parties that the transfer was to be made upon that day. It was objected at the trial, that the contract proved was for the the settling day, which was liable to be altered before the time for the transfer arrived; that the contract laid in the declaration was for the 27th of *February*, a day certain; and that this was a variance. The learned Judge, however, over-ruled the objection, and the plaintiff obtained a verdict. A rule nisi for a new trial having been obtained last term,

Gurney and *Comyn* were about to shew cause, but the Court called upon

Topping and *Chitty* in support of the rule. The contract proved is for the transfer of stock on the settling day, which is uncertain. It is true that at the time of the contract it had be enfixed by the stock exchange committee for the 27th of *February*, but it was liable to be altered before the time of transfer arrived. The contract proved, therefore, was for a day not certain and fixed; the contract laid in the declaration was for a day certain, and that is a variance, and *Payne v. Hayes* (a) is an authority expressly in point: there the contract declared on was to deliver stock on the 22d of *August*, and upon the trial the entry in the broker's book was a contract for the opening; and

(a) *Bull. N. P.* 145.

although

although it was proved to be notorious, that the books were to open on the 22d, and the broker swore he took the 22d of *August*, and the opening, to be convertible terms; yet the Court held this to be a variance. And *Penny v. Porter* (a), *Harrison v. Wilson* (b) are in point.

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ABBOTT C. J. This application is founded upon a supposed variance between the declaration and the proof, and the attention of the Court has been directed to a case in *Buller's Nisi Prius*, which, beyond all doubt, is precisely in point. It seems to me, however, that that case cannot be supported in point of principle. What weight the learned person who edited that work attached to the law there laid down, may be collected from the observation which immediately follows the case itself. Adverting to this and other cases, decided about the same time, he says, "these cases seem rather to be founded upon the times, to get rid of *South-Sea* contracts, than to be relied upon as precedents in other cases." Mr. J. *Buller* thought, therefore, that that case was not to form a rule of decision in future times; and in that opinion I most fully concur. Laying that case out of our consideration, the question is, whether the evidence here proved the contract laid in the declaration. That contract was for the transfer of stock, on the 27th of *February*. The broker stated at first that the 27th of *February* was the day mentioned by the parties; but upon being pressed, he said he could not positively say, that the 27th *February* was eo nomine mentioned; but that if it was not, the settling day was mentioned, which was at that time fixed for the

(a) 2 *East*, 2.(b) 2 *Esp.* 708.

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27th *February*. He added that either term meant the same thing, and that the parties understood that the transfer was to be made on the 27th of *February*. Now it seems to me to be competent to parties to use either one phrase or the other, to express the same thing. By using one phrase, it is a contract expressly for the 27th *February*; by the other, it is a contract substantially for the 27th of *February*; and although it has been urged that the settling day may be altered, yet no evidence was given to that effect on the trial; and on the other hand it was expressly proved, that the 27th *February* was the day contemplated by the parties. Assuming, therefore, that the term used by the parties in the making of this contract was the settling day, I am of opinion, under the circumstances, that it was substantially a contract for the transfer of stock on the 27th *February*; and consequently that there is no variance between the contract proved and that stated in the declaration.

BAYLEY J. The rule of pleading is, that a contract must be stated according to its legal operation, and if the evidence proves it, according to that legal operation it is sufficient. Here the contract stated in the declaration was a contract for the 27th of *February*, and the evidence at the trial, was either of a contract for the 27th, or for the settling day. But as it was also proved that the 27th of *February* was known to be the settling day, the proof given is of a contract substantially the same with that alleged.

HOLROYD J. I am of opinion, that the contract is proved so as to satisfy the terms of the declaration;
and

and whether the expression was the settling day, or the 27th of *February*, was wholly immaterial, because it seems to me, upon the evidence, that they both mean exactly the same thing, the settling day being at that time understood by both parties to mean the 27th of *February*. I by no means accede to what has been said in argument as to the effect of the settling day being changed before the 27th of *February*. For I am of opinion, that as it was clearly understood, that this contract was entered into for the 27th of *February*, which was then the settling day, it was, in point of legal operation, a contract for the 27th *February*; and consequently, even if the settling day had been changed to some other day, without the consent of these parties, it would have been a sufficient performance of this contract, to have transferred the stock on the day which at the time of the contract was understood by both parties to be the settling day.

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BEST J. concurred.

Rule discharged.

The KING *against* TREVENEN.

A RULE was obtained in the last term, calling on the defendant to shew cause why an information in the nature of a quo warranto should not be exhibited against him, to shew by what authority he

It is a valid objection to a relator, applying for a quo warranto information, that he was present and concurred at the

time of the objectionable election, even although he was then ignorant of the objection: for a corporator must be taken to be cognizant of the contents of his own charter, and of the law arising therefrom. The Court will not make such a rule absolute where a relator appeared to be a man in low and indigent circumstances, and there were strong grounds of suspicion that he was applying, not on his own account, or at his own expense, but in collusion with a stranger.

Z 2

claimed

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claimed and exercised the office of mayor of *Helston* in *Cornwall*, on the affidavits of the Reverend *Thomas Trevethan* and *John Thomas*, shopkeeper. It appeared from the affidavits on which the rule was granted, that the above two persons were both burgesses, and freemen of the borough, and that *Thomas* was elected a freeman in *April*, 1813. By the charter dated 14 G. 3. it appeared that the corporation consisted of a mayor, four aldermen, and a recorder, and an unlimited number of freemen and burgesses, that the recorder might appoint a deputy, and that the new mayor was to be sworn in before his predecessor if living, and if not, then before the recorder or his deputy; the deputy mayor also, who was to be appointed in case of the sickness of the mayor, was to be sworn in before the recorder. The mayor and aldermen, and the recorder and his deputy, were also by the charter appointed justices of the peace within the borough. It further appeared, that in 1785, *John Rogers*, who was then an alderman, was appointed recorder, and held both the offices of alderman and recorder up to *January*, 1814. The mode of electing the new mayor was this: on the charter-day, the mayor and aldermen were to meet and nominate two of the aldermen, out of whom the burgesses and freemen were to chuse one to be the mayor for the following year. In *September*, 1813, on the charter-day, the two persons nominated were *Thomas Grylls* and *John Rogers*, and the freemen unanimously elected the former to be mayor. The affidavits then proceeded to set out the title of the defendant, which was a derivative one under *Grylls*.

Gaselee,

Gaselee, in moving for the rule, relied on the case of *Rex v. Marshall (a)*, lately determined, by which the Court decided that two offices of this sort, viz. those of recorder and alderman, were incompatible. Here then *Rogers* by the acceptance of the former vacated the latter, and if so, the nomination of the 26th September, 1813, was illegal, inasmuch as two of the aldermen were not nominated. The election therefore of *Grylls* as mayor was bad, and the defendant's title derived under it is bad also.

By a subsequent affidavit of Mr. *Trevethan*, it appeared that he had concurred in the election of *Grylls*. In the affidavits on the other side it was stated, as to *John Thomas*, that he was a cordwainer in very low and embarrassed circumstances, that he had been an agent during the last election to Sir *Christopher Hawkins*, and they then went on to state different declarations on the part both of Sir *Christopher Hawkins* and *Thomas*, relative to this matter, in which the former had used threats, that unless the defendant would come over to his party, he would dissolve the corporation, &c. It further appeared that *Thomas* had been admitted a freeman subsequently to the election of *Grylls* as mayor, although he had been elected previously to that time.

Warren, *Scarlett*, and *Casberd* shewed cause. It is quite clear that *Trevethan* cannot be admitted as a legal relator in this court. For it appears that he concurred in the election of *Grylls*. Then as to *Thomas*, it is evident that he is the mere agent of another

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(a) E. 58 G. 3.

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person, who has himself no right whatever to apply to this court for a quo warranto, and the circumstances stated are so strong, and full of suspicion, that the Court will not, in the exercise of its discretion, permit Sir *C. Hawkins* to do that by the agency of *Thomas* which he cannot lawfully do himself, *Rex v. Cudlipp* (a), *Rex v. Stacey*. (b) Besides, *Thomas* was admitted under a person whose title depends upon that of *Grylls*, and therefore he cannot now be allowed to impeach his own title. [*Abbott C.J.* He was elected previously, and his election gave him an inchoate right; then if his admission was not valid, he has a better claim now to come to the Court to apply that a legal mayor may be appointed, and that he himself may be legally admitted.] Then, upon the merits of the case, it is to be observed, that the power of selection given to the freemen is an advantage which it is competent for them legally to waive, and here they have done so, for they unanimously elected *Grylls*. The case might have been different if any persons had voted for *Rogers*. [*Abbott C.J.* Although there is great weight in that observation, yet the Court would not on that account omit to make this rule absolute, because it is not fit that such a question should be determined on motion. On the other point, however, as to the sufficiency of the relators, the Court wishes to hear the other side.]

Pell Serjt. and *Gaselee*, contra, contended, that as to *Trevethan* it appeared, that he had concurred in the election of *Grylls*, without being aware of the objection. And though it may be admitted that a corporator

(a) 6 Term Rep. 503.

(b) 1 Term Rep. 1.

must

must be held to be cognizant of the terms of his own charter, still that only applies to the facts contained in it, and not to the law arising from them, *Rex v. Morris*. (a) And in *Rex v. Clarke* (b) the relators acquiesced in the election, but that was held by the Court not to be sufficient in that case. Then as to *Thomas*, it may be admitted, that the circumstances of suspicion are very strong, but suspicion is not enough. There must be some admission on his part, that he is applying, not on his own account, but on that of *Sir C. Hawkins*; and his being in distressed circumstances is not alone sufficient; for in the *Chester* case, a notorious pauper was the relator, and yet no objection was taken on that ground, although the Court was applied to on that occasion, to compel him to give security for costs.

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The Court held, that as to *Trevethan*, his having concurred in the election was a fatal objection. He was bound, as a corporator, to have known that the title of *Rogers* to the office of alderman was bad, and his having concurred in an act which depended for its validity upon the circumstance of *Rogers* being at that time an alderman prevents him from now having the right to come forward and impeach that title. In *Rex v. Morris*, the relators were not aware of the fact at the time of the election; which makes all the difference; and in *Rex v. Clarke* (b), they were not present, and did not concur at the time of the election. The principle which governs these cases is the acquiescence of the relator in the objectionable election at the time.

(a) 3 *East*, 213.(b) 1 *East*, 38.

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They held, therefore, that *Trevethan* was not in this case a good relator. Then as to *Thomas*, they thought that the circumstances stated in the affidavits were so strong as to induce them at all events not to make the rule absolute, unless both he and Sir *C. Hawkins* would make further affidavits negating in express terms any collusion between them on that point; for unless *Thomas* was the real prosecutor of the rule, the case of *Rex v. Cudlipp* was an authority to shew that it must be discharged.

Rule accordingly enlarged (a),
to give time to make these
further affidavits.

(a) *Rex v. Hodge*. Quo warranto against the defendant, as one of the chief burgesses of *Pembryn*. Objection, that there was not a sufficient relator. It appeared that the relator was an inhabitant of the borough; and that by the charter the government of the town, and of all the people therein, was vested in the mayor and chief burgesses. The Court thought that this clause of the charter gave a sufficient interest to the relator; and made the rule absolute.

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The KING *against* WHEELER.

SCIRE facias to repeal a patent obtained by the defendant for "a new or improved method of drying and preparing malt." At the trial before *Abbott C. J.* at the sittings after last *Michaelmas* term, a verdict was given for the crown. The specification was as follows: "My invention consists in the heating of malt to 400° and upwards of *Fahrenheit's* thermometer, according to a process or processes hereafter described, and in so heating it that the greater part of the saccharine and amylaceous principles of the grain become changed into a substance resembling gum and extractive matter, of a deep brown colour, readily soluble in hot or cold water." It then proceeded to state several modes of performing this operation; one of which was by a cylindrical iron machine like a coffee-roaster, which, by its revolution, prevented the malt, when heated, both from adhering to the sides, and from being carbonized by the action of the fire. Another apparatus was a revolving hollow iron cylinder with a screw-like channel in it, along which the malt passed, and so was exposed

Patent for "a new or improved method of drying and preparing malt." In the specification it was stated, that the invention consisted in exposing malt previously made to a very high degree of heat: but it did not describe any new machine invented for that purpose; nor the state, whether moist or dry, in which the malt was originally to be taken for the purpose of being subjected to the process; nor the utmost degree of heat which might be safely used; nor the length of time to be employed; nor the exact cri-

terion by which it might be known when the process was accomplished: Held that the patent was void; inasmuch as, 1st, the specification was not sufficiently precise; and as, 2dly, the patent appeared to be for a different thing from that mentioned in the specification. Held, also, that as the word *malt* was here not to be taken in its usual sense, viz. of an article used in the brewing, but only in the colouring of beer, that in the patent here it was necessary to have stated the purpose to which the prepared malt was to be applied, and to have said that it was obtained for a new method of drying and preparing malt to be used in the colouring of beer.

Quære, Whether a patent can be good if obtained for a mere process to be carried on by known implements or elements acting upon known substances; inasmuch as the word "manufacture," in 21 *Jac. c. 3.*, seems rather to be confined either to some new article or to some new instrument, or part of an instrument, to be used in making an article previously well known: And held, that at all events no merely philosophical or abstract principle can answer to that word, or be the subject of a patent.

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in continual motion to the action of heat; and it then added, that the process might also be performed in kilns made nearly of the ordinary construction, under proper management, and by various other contrivances. The time necessary to produce the effect, and the proper degree of heat to which the malt was to be exposed, were also stated to be variable, and to be capable of being easily learnt by experience, the colour of the internal part of the prepared grain affording the best criterion. *Abbott* C. J., at the trial, thought that the title of the patent shewed that it was obtained for a different thing than that stated in the specification: the patent being for preparing malt, which must mean making it from barley, whereas the specification appeared to be for drying malt already made. He also thought that it was defective in not stating the purposes to which the article, when prepared, was to be applied; and that the specification did not state the process with sufficient precision, so as to enable other persons afterwards to use the invention.

Harrison, on the fourth day of this term, moved for a new trial, on the ground that these objections were not sufficient to destroy the patent. Malt is completed by the process of soaking the barley, and thereby producing germination, and the operation of drying is only necessary for the purpose of keeping it. The patent, therefore, which states that it is for a new method of drying and preparing malt, obviously means that it is to be taken in the state of malt before it is to be thus dried or prepared; and the invention here, which is of great value to the public at large, only consists in giving particular qualities to malt already existing. Besides, the order of the words

words "drying and preparing" also shews that the latter cannot be used here in the sense of making malt from barley. Then, as to the second objection, it is not necessary in general for a party to state the object to which the thing invented is to be applied, and still less so here. For here the invention consists in a new mode of preparing a well known article, and it must be presumed, therefore, that the article, when prepared, will be applied to the old uses. In this case the malt is used, as all brown malt is, for the colouring of beer; and the great advantage is, that the same object is obtained with a less quantity. Then as to the objection that the specification is not sufficiently distinct in stating all the modes of effecting the process, and in omitting to say in what state the malt is originally to be taken, whether wet or dry, it may be answered, first, that it is sufficient that even one mode of effecting it is distinctly pointed out; and, secondly, that it is obvious that it is immaterial whether the malt be taken in a wet or dry state, for the process is to be continued as far as 400° of heat, and it is well known that at 212°, all moisture will evaporate. It was, therefore, wholly unnecessary to state that circumstance with precision in the specification. And the Court will not, upon light grounds or trivial mistakes, set aside a patent which has been obtained for a useful and valuable invention.

Cur. adv. vult.

ABBOTT C. J. now delivered the opinion of the Court. We have taken time to consider of this case, not by reason of any doubt entertained upon the motion, but in order that the defendant, whose rights will probably be concluded by our judgment, might not be affected

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fect by any other than a deliberate and considered opinion. This was a scire facias to repeal a patent, granted to the defendant, for what is called in the patent, "a new or improved method of drying and preparing malt." The patent is granted under several conditions and provisoes, as usual in such cases, and amongst others a proviso, that if the defendant shall not particularly describe and ascertain the nature of his invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, to be enrolled in the High Court of Chancery within six calendar months, then the patent shall be void. Several issues were taken upon the record of the scire facias, one of which was upon the fact of the enrolment of such a writing (or specification, as it is commonly called) as is required by the proviso. The cause was tried before me at the sittings after the last term, when, upon reading the patent and specification, (for a specification had been in fact enrolled,) it appeared to me that the proviso had not been complied with; and this question arising upon written instruments, and being, therefore, properly a question of law, I directed the jury to find a verdict for the crown upon that issue, which was accordingly done. In the present term a motion was made for a rule to shew cause why the verdict should not be set aside, and a new trial granted; and upon this motion the defendant has a right to assume, for the present, that the novelty and utility of his invention might have been established by proof; and the question before the Court is precisely the same as that which I determined at Nisi Prius, and depends entirely upon the construction and effect of the written instruments, viz. the patent and specification.

And

And upon this question my Brothers *Bayley* and *Holroyd* agree with me in thinking, that our decision must be against the defendant. My Brother *Best* having been engaged when he was at the bar in some of the earlier stages of this proceeding, has declined taking any part in our deliberations. The language in which the supposed invention is described in a patent of this nature is the language of the patentee himself. He represents to the crown, that he has invented this or that thing, and that he is the first and sole inventor thereof, &c.; and the crown yielding to his representation, and willing to give encouragement to all arts and inventions that may be for the public good, grants to the patentee the sole liberty and privilege of using his said invention, for a certain term, under the conditions before noticed. It is obvious, therefore, that if the patentee has not invented the matter or thing of which he represents himself to be the inventor, the consideration of the royal grant fails, and the grant consequently becomes void. And this will not be the less true, if it should happen that the patentee has invented some other matter or thing, of which, upon a due representation thereof, he might have been entitled to a grant of the exclusive use. It is well known that the granting of monopolies was restrained by the stat. 21 *Jac.* 1. c. 3. to the sole working or making of any manner of new manufactures, and to the true and first inventor of such manufactures. Now the word “manufactures” has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others, or to mean an engine or instrument, or some part of an engine or instrument, to be employed,

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employed, either in the making of some previously known article, or in some other useful purpose, as a stocking-frame, or a steam-engine for raising water from mines. Or it may perhaps extend also to a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. But no merely philosophical or abstract principle can answer to the word manufactures. Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is requisite to satisfy this word. A person, therefore, who applies to the crown for a patent, may represent himself to be the inventor of some new thing, or of some new engine or instrument. And in the latter case he may represent himself to be the inventor of a new method of accomplishing that object, which is to be accomplished by his new engine or instrument, as was the case of *Watt's* patent (a), in which he represented himself to be the inventor of a new method of lessening the consumption of steam and fuel in fire engines, and by his specification he described certain parts to be used in the construction of fire engines. Or supposing a new process to be the lawful subject of a patent, he may represent himself to be the inventor of a new process, in which case it should seem, that the word "method" may be properly used as synonymous with process. The language of the patent may be explained and reduced to certainty by the specification; but the patent must

(a) 8 T. R. 95.

not

not represent the party to be the inventor of one thing, and the specification shew him to be the inventor of another; because, perhaps, if he had represented himself as the inventor of that other, it might have been well known that the thing was of no use, or was in common use, and he might not have obtained a grant as the inventor of it.

Now to apply these general principles to the patent and specification before us. The defendant has represented himself to the crown to be the inventor "of a new or improved method of drying and preparing malt." Malt was an article of common use before the granting of this patent, possessing qualities long and well known, and prepared or made by a process practised for many years, of which drying was one of the last stages. And it is, in our opinion, impossible to read this patent, without supposing the patentee to claim the merit of having invented some new or improved method either of organ or process, of preparing or at least of drying this old and well known article. Then has the patentee by his specification shewn himself to be the inventor of any method of drying or preparing this well known article? For this we are to look at the specification; and we there find that he claims to be the inventor, not of a method of drying or preparing this well known article, but of a method of giving to it, when previously prepared, some qualities which it did not possess before, or which it possessed only in a very slight degree, namely, the qualities of being soluble in water, and colouring the liquor in which it shall be dissolved, which latter is the object in view. And this is to be effected by a second and additional process, the application of a very high

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high degree of heat. We think the invention mentioned in this specification so entirely different from that mentioned in the patent, as that the latter (if any such there be) remains wholly undescribed and unspecified, and consequently that the issue could not be found for the defendant. It was contended that this process was in truth a preparation of malt to answer a particular purpose, and that the purpose need not be noticed in the grant. It may be true in general that the purpose need not be mentioned in the grant; but if in any particular case the mention of the purpose be necessary to explain the words previously used, to shew that they were not used in their ordinary and obvious sense, but in a sense limited and confined to that particular purpose; in such a case, we think, the purpose ought to be mentioned. In this case, if the patentee had represented himself to be the inventor of a method of preparing malt, for the purpose of *colouring* beer and porter, every person who read his representation would understand, that the malt prepared according to his method was not intended to answer the common and known purposes of that article, viz. the brewing of beer, but was intended only for the special and particular purpose of colouring the liquor, and to be used in addition to common malt. But, as we have before intimated, we think no person could conjecture that to be the object of the invention mentioned in this patent. This being our opinion, it is unnecessary to say, whether or not a patent for a new method of drying and preparing malt for the colouring of beer, might be good as a patent for the manufacture, that is, for the malt so dried and prepared, if followed by a sufficient specification, which it probably might be:
nor

nor is it necessary to notice at any length the apparent defects in the specification accompanying the present patent. It was argued that the term "malt" is applied to the grain as soon as it has germinated by the effect of moisture, and before it has been dried; that malt in that state might be taken and used for the objects of the defendant's invention; and that as these were to be accomplished by heat, his was an invention for drying malt. But if this were so, then the specification would be defective in not informing the reader that the malt to be used for the intended object might or ought to be taken in that state, and in leaving him to discover by experiment, whether it should be taken in that state, or after drying, which according to the most common use of the word malt he might very reasonably suppose.

Again, this is a patent for the invention of a method, that is, of an engine, instrument, or organ, to be used for the accomplishment of some purpose; or at least of a process to be so used. The patentee does not profess to be the inventor of any engine, instrument, or organ: he says, that a coffee roaster, or a kiln, or any thing by which the grains may be kept in motion during their exposure to the requisite degree of heat, may be used. Neither has he described any certain or precise process, which, admitting that there may be a patent for a process only, ought unquestionably to be done. He does not mention the state in which the malt is to be taken, for the purpose of undergoing the process, whether in a moist or dry state as was before noticed; he does not say, what heat beyond four hundred degrees of *Fahrenheit* may be used; he does not furnish the operator with any means of knowing when he has

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this degree of heat; he does not say, during what length of time the process is to be continued, but contents himself with saying, that "the proper degree of heat, and time of exposure, will be easily learned by experience, the colour of the internal part of the prepared grain affording the best criterion;" not even mentioning what the colour is, which is to be the criterion. A specification which casts upon the public the expense and labour of experiment and trial is undoubtedly bad. If it be said, that all these matters will be well or easily known to a person of competent skill, (and to such only the patentee may be allowed to address himself,) then the inventor will not in reality have given any useful or valuable information to the public; so that in either way of viewing the case, there is either no certain and clear process described, or the process described is such as might be practised without the assistance of the patentee. For these reasons, we think the direction at *Nisi Prius* was right, and consequently that no rule should be granted.

Rule refused.

Thursday,
 Feb. 4th.

The KING *against* The Sheriffs of LONDON, in
 a Cause of TODD and Others *against* JACOB.

Practice. The Court will not set aside an attachment against the sheriff for not bringing in the body on payment of costs, on the application of the defendant, who swore to merits, where it appeared

A RULE had been obtained by *Comyn*, calling on the plaintiffs to shew cause why the attachment obtained against the sheriffs, for not bringing in the body, should not be set aside upon payment of costs. It appeared upon the affidavits, that the defendant's attorney had applied to the filazer for a copy of the writ, and that in the copy so given, one of the plaintiffs, by mis-

take,

take, was described by the name of *John* instead of *James*, and bail was put in in due time in the name of *John*. The plaintiffs took no notice of it, and proceeded by attachment against the sheriffs, for not bringing in the body, after which the defendant had become bankrupt. Bail was then put in the proper name, and the defendant's attorney swore to merits. It appeared upon the affidavits that no bail-bond had been taken.

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Bolland shewed cause. This must be considered as an application on the part of the sheriffs or their officer, and not on behalf of the defendant. It is sworn that the sheriffs neglected to take a bail-bond; and if no bail-bond was taken, there is no ground for this application, for the defendant could not be damnified by the attachment. This, therefore, must be considered as, in fact, an application in behalf of the sheriffs, and then the affidavit of merits is immaterial.

The Court were of that opinion, and refused to set aside the attachment, as they considered it was in reality an application by the sheriffs' officer, he being the only person interested in setting aside the attachment; and therefore discharged the rule with costs.

MORRIS *against* HUNT.

Thursday,
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THE rule to plead expired on *Saturday*, the 16th *January*. On that day two summonses were taken out and served in the evening, for further time to plead, and for better particulars, returnable on *Monday*, the 18th, at eleven o'clock: the plaintiff's attorney did not attend the summonses, and on *Monday* at three o'clock

Practice.
Judgment
signed after a
summons for
further time to
plead is return-
able, is irre-
gular.

A a 2

signed

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against
Hunt.

signed judgment. A rule nisi having been obtained for setting aside this judgment, for irregularity, the Court, after hearing *Scarlett* and *Smedley* against the rule, held, that the judgment was irregular, not having been actually signed till after the summons was returnable; and they said that this was distinguishable from *Calze v. Lord Lyttleton (a)*, where the judgment was signed *before* the summons was returnable, and the rule was therefore made absolute.

(a) 2 Black. 954.

Thursday,
Feb. 4th.

BIRKETT *against* WILLAN and Others.

A carrier is liable for gross negligence, although the goods are above the value mentioned in his public notice, and although they are not specially entered and insured.

ACTION by the plaintiffs against the defendants, as proprietors of the *London and Exeter* coach, to recover the value of a box of cochineal, sent by their coach to *Exeter*. At the trial before *Abbott J.* at the *London* sittings after last *Trinity* term, it appeared in evidence, that the plaintiffs, who were wholesale druggists in *London*, on the 1st of *March*, 1817, had received a letter, dated *Exeter*, subscribed "*J. Worthy*," desiring them to send to him at *Exeter* sixty-five pounds of cochineal. The plaintiffs having had dealings with a person of the name of *Jonathan Worthy*, residing at *Exeter*, packed up the cochineal, and directed it to "*J. Worthy, Exeter*." Their porter took it to the defendant's coach-office, where a receipt was given by the book-keeper for the box in question described as a box of cochineal, and on the same day the plaintiffs wrote to their correspondent, *Mr. Worthy*, informing him, that they had executed his order. The coach reached

reached *Exeter* on a *Saturday*, and on that evening a man enquired at the office, if a box had arrived for Mr. *Worthy*, and upon being answered that such a box had arrived, he asked what the price of the carriage was, and whether he might have it on the next day, the answer given was, that the price was 16s. 6d., and that parcels were never sent out on a *Sunday*, but that by sending for it, he might have it. A labouring man standing near the inn on *Sunday* night was accosted by a stranger, and promised 6d. if he would fetch from the office a box directed for Mr. *Worthy*. Upon his assenting, 16s. 6d. was given him to pay for the carriage, and he went to the office and asked for Mr. *Worthy's* box. Upon the book-keeper's asking who had sent him, he replied, he did not know the person, but it was a man in the street; the book-keeper said he had two packages for Mr. *Worthy*, the one a box, the other a small parcel; the man said that he had only money to pay for the *box*, but that he would ask the person who had sent him, for money to pay for the parcel also, and on his going out of the office and so doing, the other told him he would only have the box *then*, and would leave the parcel till the following day. The book-keeper then delivered the box to the man who had applied for it, and the latter delivered it to the stranger who had employed him. It was proved, that the letter of order was not written by *Worthy*, the correspondent of the plaintiffs. It was further proved, that at the coach-office of the defendants in *London*, where the box was delivered, there was affixed a public notice, "that the proprietors would not be answerable for any package of more than 5*l.* value, if lost or damaged, unless the same be specified, and insurance paid over and above the common carriage;" but the porter

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who carried the parcel to the office, swore, that he did not see the notice, and it was not proved that the plaintiff himself had any knowledge of the contents of such notice. Upon these facts, the learned Judge directed the jury first, that if they believed the plaintiff knew the contents of the notice, that they should find a verdict for the defendants; but, secondly, if they did not believe that the plaintiff was acquainted with the terms of the notice, that then they should consider in this case whether there had been any want of care in the defendants having delivered the parcel to the person who came for it; he added that if a parcel was directed to a person generally, in such a place as *Exeter*, without specifying his place of abode, the carrier was not bound to carry that parcel to any place, but he would fully discharge his duty by delivering it at his office, to any person coming from the person to whom it was so directed, or whom he might reasonably suppose to come from that person; and he left it to the jury to say, whether, under the circumstances proved, the defendant had reasonable ground for thinking, that the man to whom he did deliver the parcel came from the person to whom it was directed. The jury found a verdict for the defendants.

A rule nisi for a new trial had been obtained by *Marryat*, on the ground that the jury had been directed to find a verdict for the defendants, if they thought the plaintiff was acquainted with the terms of the notice, and if, 2dly, the defendants had not taken due care; whereas, assuming that the defendants were guilty of gross negligence, the defendants were still liable, notwithstanding their notice; and therefore
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the two questions ought to have been left distinctly and separately to the jury. And now,

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Scarlett, Gurney, Gaselee, and Tindal, shewed cause against the rule. By the express terms of the notice the defendants are not to be liable for any package above 5*l.* value, unless specified, and an insurance be paid; and assuming, therefore, that the jury were of opinion that the plaintiffs were acquainted with the terms of the notice, the verdict found for the defendants was right. The case of *Beck v. Evans* (a) was an instance of very gross negligence, and even the authority of that case has been considerably shaken by a later decision in the Court of Exchequer, of *Levi v. Waterhouse*. (b)

Marryat, Comyn, and R. B. Comyn, contra. Assuming that the plaintiffs in this case were acquainted with the contents of the notice, still, as the defendants received a box of cochineal, with the contents and value of which they were acquainted, they are not discharged from their responsibility, if they have been guilty of gross negligence. *Beck v. Evans* is an authority in point: there the carrier had received a cask of brandy which leaked on the road, and the leak having been pointed out to the carrier's servant, he suffered it to continue, and a considerable quantity of brandy was lost. In that case, although a notice similar to the present was given, still the carriers were held responsible, because the loss accrued from their own negligence; and the late case of *Bodenham v. Bennett* (c), in

(a) 16 *East*, 244.(b) 1 *Price*, 280.(c) 4 *Price*, 31.

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the Exchequer, is a strong authority to shew, that this is what the law calls gross negligence. And there, *Wood* Baron, speaking of these notices, says, "These special conditions were introduced for the purpose of exempting carriers from extraordinary events, but they were not meant to exempt them from due and ordinary care;" besides, this case does not come within the terms of the notice, for here the box was not *lost or damaged*, but it was mis-delivered.

ABBOTT C. J. I certainly thought at the trial, that supposing the plaintiffs to have been acquainted with the terms of the notice, this was not such a case of gross negligence as would throw the onus of responsibility on the carrier. Upon consideration, however, I am not so clear upon that point. The case of *Bodenham v. Bennett*, in the Exchequer, is an authority the other way; and upon the whole, I think there should be a new trial. (b)

Rule absolute.

(a) See *Wilson v. Freeman*, 3 Campb. 527.

Friday,
Feb. 5th.

RICKETTS *against* SALWEY.

In an action for disturbance of plaintiff's right of common, the declaration stated that he

was possessed of a messuage and land, with the appurtenants, and by reason thereof ought to have common of pasture, &c. : Held that this allegation was divisible, and that proof that plaintiff was possessed of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages pro tanto.

ACTION for disturbance of plaintiff's right of common. Declaration stated, that the plaintiff was possessed of a certain messuage, and divers, to wit, one

hundred

hundred and fifty acres of land, with the appurtenants situate and being in the parish of *Ashford Bowdler*, in the said county, and by reason thereof, during all the time aforesaid, ought to have had, and still of right ought to have common of pasture for all his commonable sheep, levant and couchant, in and upon said messuage and land with the appurtenants, in, over, and upon a certain waste or common called the *Wheat Common*, situate and being in the parish aforesaid, in said county, every year and at all times of the year, as to the said messuage and land with the appurtenants, belonging and appertaining. And that the defendant disturbed him in that right, by digging stone quarries upon the common. Plea, not guilty. At the trial at the last *Shrewsbury* assizes, before *Garrow B.*, it appeared that the right of common was claimed by the plaintiff in respect of *Ashford Hall*, and the land usually held with it, on which issue the plaintiff failed. It appeared, however, that he was possessed of land within the parish, in respect of which he was entitled to a right of common, but there was no messuage upon this land. The learned Judge directed a verdict to be entered for the plaintiff, giving to the defendant leave to move to enter a nonsuit. *W. E. Taunton*, in last *Michaelmas* term, having obtained a rule nisi for this purpose, on the ground that the proof did not support the right of common, as claimed in the declaration,

Puller and *Winter* (*Jervis* was with them) shewed cause. Here, the title is only matter of inducement, and in *Com. Dig.* Action on the Case for a Disturbance, B. 1., it is laid down, that in such a case, a variance found
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by verdict from the prescription alleged is only inducement, and does not hurt. In *Yarty v. Turnock* (a), the declaration alleged, that plaintiff was seized of sixty acres of pasture, sixty of meadow, and eighty of arable land, and entitled, in respect of them, to a right of common. There the jury found a right of common in respect of ninety acres of arable, meadow and pasture. And there *Doddridge J.* takes the distinction, for he says, "Here the demand is of damages for a tort done to his common, and if it be found in any part, he has damages accordingly:" and he then notices the cases of prescription and contract which must be proved as laid. That case, therefore, is precisely in point to this. So in *Gregory v. Hill* (b), it was held that a right claimed in respect of a messuage and twenty acres was well supported by evidence of a right in respect of a messuage and eighteen acres only. *Bertie v. Beaumont* (c), *Strode v. Byrt* (d), and *Ferrer v. Johnson* (e), shew also that in such cases a variance from the title, which is set out only by way of inducement, is immaterial. They also quoted *Vowles v. Miller* (f), and *Winn v. White*. (g)

Taunton and Campbell, contra. The declaration after setting out plaintiff's possession of a messuage and land with the appurtenants, proceeds, that "by reason thereof, he was entitled to the right of common." Now the words "by reason thereof" shew that the right is claimed for both, and the word appurtenants

(a) *Palmer*, 269. *Cro. Jac.* 629. S. C.(b) *Cro. El.* 531.(c) 16 *East*, 83.(d) 4 *Mod.* 418.(e) *Cro. El.* 336.(f) 3 *Taunt.* 137.(g) 2 *Black.* 840.

connects

connects the land and messuage together. Then, if so, the plaintiff has not proved any title in respect of a messuage and land: he has, therefore, wholly failed. And the inconvenience resulting from the contrary being held to be law will be this, that the party who comes prepared, as the defendant did here, to answer one case, as to a right claimed in respect of a house and land, will be turned round by the plaintiff's proving a right in respect of an acre of land in some remote corner of the parish. The cases cited do not decide the point. In *Yarly v. Turnock* the prescription was proved, and the only variance which could be suggested was in the quantity of land. But here there is one part wholly omitted, viz. the messuage. In *Strode v. Byrt* the only question was, whether it was necessary in a possessory action to set out the title at length, and the Court held that it was not. But here it is set out and not correctly stated. This is a necessary allegation for the plaintiff's case. If it be not made, he has no case. Then if so, it must be accurately proved as laid.

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ABBOTT C. J. The general rule of pleading in cases of tort is that it is sufficient if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved. There is one exception, however, to this rule, which is where the allegation contains matter of description. Then, if the proof given be different from the statement, the variance is fatal. The only difficulty in this case is to ascertain whether these words are matter of description or not. The words are, "that the plaintiff was possessed
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of a messuage and 150 acres of land, with the appurtenants, and by reason thereof, was entitled to common of pasture for sheep, levant and couchant, on the said messuage, &c. at all times of the year, upon a certain common called *Wheat Common*." But there are not the words "thereto belonging," or any others of the like import, so as to connect the messuage and the land together. Had there been such words of connexion, I should have thought that the plaintiff was not entitled to recover. But this is not the case; and the messuage and lands are not connected together as one entire tenement. I think, therefore, that these are not words of description; but that this allegation is divisible, and that it may be considered as stating that the plaintiff was possessed of a house, and also that he was possessed of land, and that in respect of both or either he was entitled to the right of common in question. That being the case, the plaintiff, who has proved an injury done to the right claimed in respect of the land, is entitled to a verdict. The rule, therefore, for entering a nonsuit must be discharged. The defendant, however, is entitled to have the verdict entered specially, according to the evidence at the trial, and then this objection, if it be valid, may be taken advantage of upon the record.

BAYLEY J. I think that this allegation is not entire, but divisible; and that if the plaintiff proves a part only, and that he has been injured in respect of that part, it is sufficient. The allegation is, that the plaintiff was possessed of a certain messuage and 150 acres of land, and that in respect of them he was entitled to the right of common in question. Now I think that that is in legal effect a claim of a right of common

common either in respect of the whole or a part, and that the plaintiff is not bound to prove his right in respect of the whole. There is one mode of putting this case which will make it more intelligible. Suppose that the right had originally existed, both in respect of the messuage and also of the land, would it be an answer to an action for the disturbance of that right to shew that the right had been extinguished in some part of the land. It is true that that is only putting this very case in a different light; but it shews that the Court have come to a right conclusion. In this case it appears that the plaintiff has been injured, supposing him to be able to shew that he has a right of common, either in respect of the messuage or any part of the land. A difficulty may be suggested, that if this were held sufficient, it would follow that it would be competent for him to prove his right in respect of five acres here and five acres there; but that is not so. For by this declaration there is only one right claimed. The plaintiff, therefore, could not prove distinct rights belonging to unconnected portions of land. Then the case of *Yarly v. Turnock* is a strong authority to shew that the present decision of the Court is right. There the declaration stated the plaintiff's claim in respect of 60 acres pasture, 60 acres meadow, and 80 acres arable land, and the verdict found a right in respect of 90 acres arable, meadow, and pasture; and as to the residue, that the plaintiff was not entitled to it. Now there the plaintiff must have failed if it had been necessary to have proved the whole allegation. It is said that he there failed only as to quantity; but that here he has failed as to quality, not having proved a right in respect of any messuage at all. But there is no foundation

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ation for such a distinction; and I am, therefore, of opinion that the verdict is right.

HOLROYD J. I am of the same opinion, that the allegation in this case has been sufficiently proved. It is quite enough in cases of tort if you prove the same ground of action laid in the declaration, although not to the extent there stated. And in such cases the Court will give judgment as if the declaration had been originally confined to the ground of action proved. In the cases of contract and prescription it is different; for in the former, if all that is stated in the declaration be not proved, it is a proof of a different contract, and a different ground of action. The party, therefore, cannot be entitled to the judgment of the Court. In the latter case, where a prescription is alleged in bar, it is one entire thing, and must be proved as laid. In the present case the declaration does not allege any prescription, but states that the plaintiff was possessed of a messuage and land, and that he ought in respect of them to have a right of common. Now the proof given is not of a different allegation, but of the same allegation in part, and that is sufficient. It is admitted, that if the allegation had been of a right in respect of a certain quantity of land only, and the proof had been of a right in respect of a part of that land, it would be sufficient. Then how can it be contended that it makes any difference that the premises in respect of which the right is not proved are of a different description from those in respect of which it is proved. If it be sufficient to prove part of an allegation claiming a right in respect of land only, there is no principle of

of law which shews that the same rule does not apply to an allegation claiming such a right in respect of a messuage and land. For these reasons, I am of opinion that the verdict is right.

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BEST J. In cases of contract and prescription the allegation must be proved as laid; but that rule is not applicable to cases of tort, where the right is merely the inducement to the action. In this case, the plaintiff is entitled to our judgment, if he has a right of common, and that right has been disturbed by the defendant. Now he has stated a right in his declaration, and has proved the same right in part by his evidence; and I think that is sufficient to entitle him to damages pro tanto. The rule, therefore, must be discharged.

Rule discharged.

DOE, dem. ROBERTS, *against* ROBERTS, Widow.

EJECTMENT for certain premises situate in the county of *Worcester*. At the trial at the last assizes for that county, before *Garrow B.*, the plaintiff rested his case on a deed, executed *August 1st, 1817*, by which *George Roberts*, the husband of the defendant, had conveyed the premises in question to him; and the only question was, as to the validity of this deed. The solicitor who had prepared the deed proved its execution. On his cross-examination, he said he had received instructions from both parties, who were brothers, to prepare it. That the avowed object was to give the present plaintiff a colourable qualification to kill game, and to get rid of an information then pending against him. That he told *George* that it was a dan-

No man can be allowed to allege his own fraud to avoid his own deed; and, therefore, where a deed of conveyance of an estate from one brother to another was executed to give the latter a colourable qualification to kill game: Held that, as against the parties to the deed, it was valid, and was sufficient to support an ejectment for the premises.

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dangerous deed for him to execute, but he said he could trust his brother. The title deeds were retained by *George* in his own possession. It was objected, that this evidence was not receivable; that a party could not avoid his own deed by shewing fraud, to which he was himself a party. The learned Judge received the evidence, and the defendant had a verdict. A rule nisi having been obtained in last *Michaelmas* term for setting aside this verdict,

Puller and *Campbell* now shewed cause. They relied on the case of *Platamone v. Staple* (a), where an injunction was obtained to restrain the defendant from suing on a rent charge, granted for the purpose of a qualification to sit in parliament. In *Birch v. Blagrove* (b), the conveyance was to avoid being sheriff of *London*; and it was held, that it was wholly inoperative: and *Ward v. Lants* (c) is to the same effect.

Jervis and *Peake*, contra, were stopped by the Court.

ABBOTT C. J. There is no doubt in this case. The plaintiff, at the trial, produced a proper deed of conveyance, and proved its execution, and by that he established his title to the premises. The defendant endeavoured to defeat this, by shewing that the deed was delivered for the fraudulent purpose of giving to the plaintiff a colourable qualification to kill game; but in the case of *Montefiori v. Montefiori* (a), Lord *Mansfield* expressly said, "that no man shall set up his own iniquity as a defence, any more than as a cause of action." Here that is attempted to be done; but the

(a) *Cooper. Cas. in Chan.* 250.

(c) *Prec. in Ch.* 182,

(b) *Amb.* 264.

(d) 1 *Black.* 363.

defendant

defendant cannot be allowed to be heard upon this matter. The case is quite different from those which have been cited. In the two latter, the fraudulent deed was never delivered; and in the case of *Platamone v. Staple*, the party might very likely have intended to give a rent-charge, only in the event of the defendant's becoming a member of parliament, and the Court might very properly have decided that case, on the ground that that object had failed. On the authority, however, of *Montefiori v. Montefiori*, which is expressly in point, I think that there ought to be a new trial.

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Dor, dem.
ROBERTA,
against
ROBERTA.

BAYLEY J. There is no doubt, that where two persons agree to commit a fraud, neither of them can expect any assistance from a court of law, to relieve him against the consequences of it. This defence ought to have had no weight. By the production of the deed, the plaintiff established a *prima facie* title; and we cannot allow the defendant to be heard in a court of justice to say, that his own deed is to be avoided by his own fraud. The cases are very distinguishable from this. In *Birch v. Blagrove*, Lord Hardwicke expressly puts it on the ground not of fraud but of mistake; and in *Platamone v. Staple*, the deed was executed for a special purpose, which never took effect. There must therefore, be a new trial.

HOLROYD J. A deed may be avoided on the ground of fraud; but then the objection must come from a person neither party nor privy to it, for no man can allege his own fraud, in order to invalidate his own deed. The case of *Hawes v. Leader*, (a) is also in point.

(a) *Cro. Jac.* 270. *Yelv.* 196. S. C.

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Doe, dem.
ROBERTS,
against
ROBERTS.

There it was held, upon a plea of the statute of 13 *Eliz.* to a deed, that the defendant was not such a person as could plead that plea; and this reason is given, that the statute makes the deed void as against the creditor, but not as against the party himself, his executors or administrators, for as against them it remains a good deed of gift. That case, therefore, as well as the one in *Blackstone*, proves, that the estate passed by the execution of this deed; and that until a re-conveyance takes place, the plaintiff is entitled to the possession of it.

BEST J. There is only one case, that of fraud, where a deed can be avoided by parol testimony, but that cannot be done where both the parties to the deed are implicated in the fraud. Here they were both guilty of an indictable conspiracy, in endeavouring, by this fraudulent transaction, to get rid of the information then pending against the plaintiff. The most favourable way in which this case could be put for the defendant would be, to say that this was a voluntary conveyance; but even then it would be good. I am therefore of opinion, that there must be a new trial.

Rule absolute.

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DOE, dem. JAMES and Another, *against* STANTON. *Friday, Feb. 5th.*

EJECTMENT for certain counting-houses and wharfs situated in the city of *Worcester*. At the trial at the last *Summer* assizes there, before *Garrow* B., the only question was, whether the defendant was the tenant in possession. It appeared that the declaration in ejectment had been served on him, and explained to him, and he then answered, that if he had known the business the day before, he might have been served on the wharf. It appeared also that he sold coals there, and paid the rates, and that he was a servant to *Dyneley*, the proprietor of the wharf, who was the person whose name was on the parish rates. It was contended, that as there was no evidence to shew an occupation, or a claim to occupy in his own right, the defendant must be taken to be a mere servant, against whom an ejectment will not lie. The learned Judge being of this opinion, the plaintiff was nonsuited. A rule nisi for setting aside this nonsuit, having been obtained in last *Michaelmas* term, on the authority of *Doe v. Stradling*. (a)

Where a defendant, on being served with a declaration in ejectment, assented to the character of tenant in possession, and afterwards appeared and pleaded: Held that it was quite sufficient evidence for a jury to find that he was the tenant, in possession, although it also appeared that he was in the situation only of a servant, and managed the business for the real owner on the premises.

Campbell now shewed cause. If the defendant be not the tenant in possession, ejectment will not lie against him. And this appears from the affidavit necessary to obtain judgment against the casual ejector; for a service on a servant on the premises, will not do. In *Doe v. Wilde* (b), it seems to have been

(a) 2 *Starkie*, 187.(b) 5 *Taunt.* 183.

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Dec. dem.
JAMES,
against
Simpson.

assumed, that an ejectment will not lie against a bailiff. Here the defendant was a competent witness, and might have been examined if the action had been brought against the right person. After the ejectment, comes the action for mesne profits, and can it be said that that would lie against a mere servant, who has had no beneficial occupation.

Puller, contra, was stopped by the Court.

ABBOTT C. J. It appears to have been too hastily assumed at nisi prius, that the defendant was in the situation of a mere servant. For there was proof given that he bore the character of tenant, capable perhaps of being explained, but certainly not explained by any evidence in the case. He paid the rates, and it does not appear that any one else did; it is said, that another person was rated, but that is by no means conclusive, for nothing is more common, than for a name different from that of the real occupier, to appear in the parish books. As to the point suggested, that a servant is not liable to an ejectment, it is going too far to say, that under no circumstances that can be. There may be cases in which the Court would hold, that ejectment would lie against a servant. But it is unnecessary to decide that point in this case.

BAYLEY J. It is sufficient to subject a party to this action, that he has the visible occupation of the premises, and it is not necessary that he should have such an interest as to enable him to maintain trespass. When a servant is served with a notice of ejectment as tenant in possession, it is competent for him to explain his

situation, and so to set the other party right; or, as he seems to have done in this case, to mislead him. If he adopts the latter course, it is very possible that a jury may think that he ought to be considered as the tenant in possession. As to what is urged with respect to the mesne profits, the answer is easy. The recovery in ejectment only proves the title, but in order to support that action, he must go further, and prove actual occupation by the defendant. That was determined in *Aslin v. Parkin*.^(a) Upon the whole, I think, that there was quite sufficient evidence in this case, for the jury to find that the defendant was the tenant in possession.

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Doe, dem.
JAMES,
against
STANTON.

HOLROYD J. I am of the same opinion. The defendant when he was served with the declaration as tenant in possession, assented to that character, and that assent, coupled with his subsequent appearance and plea, was sufficient evidence to go to the jury.

BEST J. concurred.

Rule absolute.

(a) 2 Burr. 668.

THORPE *against* BEER.

Friday,
Feb. 5th.

GASELEE had obtained a rule nisi for setting aside a writ of execution for irregularity, on the ground that a writ of error had been previously sued out and allowed, although it had not been served. It

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Waiver of irregularity.

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appeared

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 Tinsley
 against
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appeared that the writ of error was sued out on the 12th *November*, returnable on the 29th. Judgment was signed on the 22d of *November*; notice of taxation of costs was given on the 12th *November* for the 21st, on which day the costs were taxed, and the writ of execution was issued on the 30th *November*. It further appeared, that on 23d *December*, the defendant took out a summons before a single judge, for the plaintiff to shew cause why the writ of execution should not be set aside for irregularity; and the only irregularity then suggested was, that no notice in writing had been given of the taxation of costs. That application, however, failed. The allowance of the writ of error had never been served on plaintiff's attorney, nor had he any knowledge of it previously to the present application.

Comyn shewed cause. He admitted that the service of the allowance of a writ of error was not necessary, but contended, that the defendant, by not mentioning this irregularity at the time of the summons before the single judge, must be taken to have waived it.

Gaselee, contra, contended, that this was no waiver, and that the party was at liberty to take advantage of it now.

The Court said, that they were of opinion, that this was a waiver of the irregularity. Where a party applies to a Judge in chambers, or to the Court, he is bound to state all the irregularities on which he means to rely, and must be considered to have waived all those which he does not state at the time. This rule is founded in great convenience, and should be adhered to.

to. However, as this was a question of doubt, and a conclusion to which they had not come without great hesitation, they said they would discharge the rule without costs.

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THORPE
against
BEEB.

Rule discharged.

The KING *against* HOUGHTON-LE-SPRING.

Saturday,
Feb. 6th.

UPON an appeal against an order of removal of two justices, whereby *Ann Cowell*, widow, and her four children, were removed from *Houghton-le-Spring* to *Harraton*; the sessions quashed the order, subject to the opinion of the Court on the following case:

The pauper, *Ann Cowell*, was the widow of *William Cowell*, and the four children mentioned in the order were their children. *William Cowell*, on the 12th day of *October*, 1805, being unmarried and without child or children, duly executed, together with sixty-one other persons, a deed, which purported to be an indenture, whereby it was witnessed, that they whose names or marks were thereunder written, and seals affixed, for and in consideration of one shilling a piece then received, and of certain wages to be paid to them, had hired and bound themselves to *Thomas Croudace* and *Sober Watkin*, and their heirs, to be their servants, workmen, barrowmen, hewers, and putters of coal, or drawers of horses, from the 18th day of *October* next ensuing, till the 18th day of *October*, 1806. This deed was executed by *William Cowell*, in the presence of an agent of *Thomas Croudace* and *Sober Watkin*, but it was not signed by *Thomas Croudace* or *Sober Watkin*

To make a valid contract of hiring and service it is not absolutely necessary that the contract, when by deed, should be executed by the master; it is sufficient that he accepted the services on the terms of the deed; and, therefore, where a pauper executed a deed, by which he became bound to serve the master for a year, and afterwards entered into and continued in his service for that period, it was held that such deed, although not executed by the master, ought to have been received in evidence to shew the terms of the hiring.

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against
HARRATON-LR-
Sedgwick.

themselves, or by any one on their behalf. *William Connell* entered into the service of *Thomas Croudace* and *Sober Watkin*, in pursuance of the deed, on the 18th of October, 1805, and continued in that service, till the 18th of October, 1806, and received the wages specified in the deed, and lived, during the whole of his year's service, in the township of *Harraton*, and acquired no settlement subsequently. The sessions thought that the deed was not legally admissible in evidence, because it purported to be an indenture, and was not executed by *Thomas Croudace* and *Sober Watkin*, or either of them, or by any person on their behalf; and considering further, that without it there was no sufficient evidence of a hiring for a year, they quashed the order.

Nolan, in support of the order of sessions. To make this a valid contract, it must be binding on both parties: here it was not executed by the master, and therefore he was not bound by its stipulations. Then unless the deed be admissible, there is nothing but a service for a year; and the sessions have negatived the fact of there ever having been a hiring for a year.

Grey, contra. It is by no means necessary that a written agreement should be actually signed by the master, in order to constitute a valid contract of hiring and service. It is quite sufficient, to shew that the master accepted the services, upon the terms of such a contract; and it is quite clear in this case, that the master accepted the services of the pauper, upon the terms of the agreement. Then if so, the deed should have been admitted to shew what the terms were on which

which the pauper came; and if that had been done, there would have been a clear hiring for a year, and a service for a year.

1819.

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The King
against
Houartou-Lx-
Srauc.

BAYLEY J. The only question in this case is, whether the execution of the indenture by the servant only is sufficient to constitute a valid contract of hiring. Now in order to do that, there must be an obligation both on the part of the servant and the master; here it is admitted, that the execution by the servant, bound him to serve for a year; and the objection is only that the master was not equally bound to keep him. But if the master, knowing the terms by which the servant is bound, accept his service, then I apprehend that the agreement must be considered binding on him, although he has not executed the deed. For it is laid down in *Co. Litt. (a)*, that a party who takes the benefit of a deed, is bound by it, although he has not executed it. But the sessions have not found the fact, that the master had this knowledge; and although it is probable that they would have found it, still, having stopped the case in limine, it must now go back to them to have this fact determined. Their proper course would have been, to have received the deed in evidence, and then to have permitted the party to have proved such facts from which the knowledge of its contents by the master, and his acceptance of the service on those terms, might be inferred.

HOLROYD J. The only difficulty in this case is, that the sessions should have found the fact of the acceptance of the service by the master, under the terms of the deed. It is stated, that the servant con-

(a) 230. b. note 1.

tinued

1819.

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against
HOUGHTON-LE-
SPRING.

tinued in the service for a year; and if it had been found as a fact, that the master was cognizant of the contents of the deed, his receiving the servant in pursuance of it, would, in point of law, have been a receiving him on the terms therein contained, which would be sufficient to confer a settlement. It is, however, for the sessions to find these facts, and to draw this inference.

Case sent back to sessions. (a)

(a) *Abbott C. J.* was sitting at Nisi Prius at *Guildhall*, during the whole day. *Best J.* was in the Bail Court.

Saturday,
Feb. 6th.

The KING *against* DAMAN.

In a conviction, founded upon 5 G. 3. c. 14. s. 3., it must be distinctly stated in the information and in the evidence, that the proceeding was at the instance of the owner of the fishery; and, therefore, where it was merely stated in the memorandum of a conviction, that the proceeding was at the instance of such owner, and where the information, without containing any such allegation, concluded with a mere prayer

of judgment on behalf of such owner, and the evidence was wholly silent on the subject, the conviction was held to be bad.

THE defendant had been convicted before three justices of the county of *Southampton*, under the 5 G. 3. c. 14. s. 3. of destroying, with a net, fish in enclosed grounds, being private property. The conviction stated as follows, "Be it remembered, that on 31st *January*, 1818 at, &c. Sir *Henry Fane*, of, &c. at the instance and on the behalf of the Honourable Anne Fane, widow, lady of the manor of *Avon Tyrrell*, in the said county, came in his proper person before us, and gave us to be informed, &c. It then proceeded to set out a regular information by Sir *H. Fane*, against the defendant, for the offence, concluding thus; whereupon the said Sir *H. Fane* on behalf of the said *A. Fane*, lady of the manor, and owner of the fishery aforesaid, prayed judgment, and

that

that the defendant might be brought before us, &c. The conviction then set out the defendant's appearance and plea, and the evidence. But it was not expressly stated, either upon the face of the information, or in the evidence, that the proceedings originated with the Honourable *Anne Fane*, the owner of the fishery. The conviction having been removed into this court, by certiorari, a rule nisi was obtained in *Michaelmas* term last, to quash it, and the case was now argued by

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The King
against
DAMAN.

Chitty against the conviction. By the 5 G. 3. c. 14. s. 3., any person that shall kill or destroy fish in any river or stream, pond or pool, or other water, being lawfully convicted, shall forfeit and pay, for every such offence, the sum of 5*l.* to the owner of the fishery. The act then goes on to point out the mode of proceeding by information before a magistrate, and in the fourth section, enables the owner of the fishery to maintain an action of debt for the penalty. Inasmuch, therefore, as the penalty is payable to the owner of the fishery, it ought clearly to appear, both upon the information, and upon the evidence, that the proceeding originated with him. It is true, that in this case, it is stated in the memorandum, that it was at the instance, and on behalf of the owner of the fishery; but that is only the language of the magistrates, and there is nothing stated in the information, or in the proof, to shew that it originated at her instance. And he cited *Rex v. Corden* (a), as conclusive on this point.

(a) 4 Burr. 2279.

Casberd,

1819.

The King
against
DANIEL.

Casberd, contra. It does sufficiently appear here, that the prosecution was commenced at the instance of the owner of the fishery; for it is stated, that Sir *H. Fane*, at the instance and on the behalf of the Honourable *Anne Fane*, came before the justices and exhibited the information; at the conclusion of which, Sir *H. Fane*, on behalf of *Anne Fane*, prays judgment. Inasmuch, therefore, as it appears upon the face of the conviction itself, that the information was exhibited at the instance of the owner of the fishery, and also that the judgment was prayed on her behalf, there is no ground for this objection. These circumstances did not exist in the case cited.

BAYLEY J. In the case of a conviction, nothing can be supplied, either by intendment or argument; and therefore we must, on the present occasion, look only to the express words of the conviction, and of the act of parliament. The act was passed for the more effectual preservation of fish, and it directs that the offender shall forfeit for every offence 5*l.* to the owner of the fishery, and gives him a power of obtaining the penalty either by information or action. In the latter case the proceeding must be in his name; and in the former, therefore, it follows, by necessary intendment, that it must appear on the face of the proceedings, either that the penalty is sued for in his name, or at his instance. And it is not sufficient that this fact should be stated by the justice in the conviction, but it must be also embodied in the information, and established by the proof. In this case, the magistrates state in the conviction, that Sir *Henry Fane*,

at

at the instance and on the behalf of the Honourable *Anne Fane*, lady of the manor, &c. appeared before them. Now it does not appear upon what authority that fact is stated, and there is nothing proceeding from the party which leads to that conclusion. Then, in the information it is stated, that Sir *H. Fane*, on the behalf of *A. Fane*, prays the judgment; but it is not stated that he does it at her instance, and there is amaterial distinction between the two phrases. For the latter necessarily implies a previous communication, which the former does not. Then comes the appearance of the defendant, and his plea of not guilty after hearing the information read. Now as the information is wholly silent as to the person at whose instance the charge is made, the defendant is unapprized of that circumstance; and it is to be observed, that if that fact had formed part of the information, the plea of not guilty would have put it in issue, and made it necessary for the prosecutor to prove it. I am, therefore, of opinion, that the act of parliament requires the information to be in the name, or at the instance of the party grieved, and that that must appear both in the information, and in the evidence stated in the conviction. And that not having been done in this case, this conviction must be quashed.

HOLROYD J. I am of the same opinion. All the facts necessary to subject the party to the penalty imposed by the act of parliament, must appear upon the information, and be established by proof. It is indced here stated, that the person applying, appeared on the behalf of the lady of the manor, but that is only the language of the justices, and the information does not contain any allegation, that it is prosecuted at her instance.

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against
DANIEL.

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instance. The case of *Rex v. Corden* is an authority to shew that that is necessary.

Barr J. It is not clear that the lady of the manor has ever adopted this proceeding; and she may, for any thing that appears here, still bring an action for the penalty. Now the party ought not to be oppressed by two prosecutions for one offence. The conviction is therefore bad, and ought to be quashed.

Conviction quashed.

Saturday,
Feb. 6th.

The KING against The Inhabitants of SAINT
MARY BREDIN, in CANTERBURY.

Where a master mariner, having no immediate occasion for his apprentice's service, the vessel being then in dock, offered either to turn him over to another master for a time, or to let him go back to school, and the apprentice said he would go back to school and learn navigation; and accordingly did so, and resided above forty days there: Held that such residence was not a residence under the indentures, and that he did not thereby gain a settlement.

WILLIAM Ward, and *Elizabeth* his wife, and one child were removed by an order of two justices from the parish of *Whitstable* in the county of *Kent*, to the parish of *St. Mary Bredin* in the city and county of the city of *Canterbury*. The sessions, on appeal, confirmed the order, subject to the opinion of the Court of King's Bench, upon the following case. The pauper *William Ward*, was bound by indentures, dated in *October, 1807*, to *John Hunter*, master of the *Stranger, West Indiaman*, for five years. The premium paid was 40*l.*, and the pauper was to receive from *Hunter* 8*l.* wages for each year's service, making 40*l.* for the five years, out of which the pauper was to find his own clothing. He made three voyages in the *Stranger* to *Montego Bay*, and back to *London*. At the expiration of the third voyage, the ship wanted repair, and was laid up in *Shadwell* dock. When the ship went into dock, the pauper slept at his master's house,

house, in the parish of *St. Matthew, Bethnal Green*. After he been there some time, his master told him, that he had not then any employment for him, and asked him if he would like to be turned over to another master, or to go back to school at *Canterbury*, till the ship was ready. The pauper said, that he would rather go back to school and learn navigation. He accordingly went to *Canterbury*, to his guardian, (his parents being dead), and was told by his guardian to go to Mr. *Quested's* school, where the pauper had formerly been educated. He accordingly went to Mr. *Quested's* school, which is in the parish of *St. Mary Bredin* in *Canterbury*, where he stayed and slept for nearly twelve months, and then ran away, and never returned either to the school, or to his master, *John Hunter*. The master did not agree to pay, nor in fact did he pay any part of the expense of the pauper's board or schooling, or of the wages after the pauper had left *Bethnal Green*, but the whole of the expense was defrayed by the pauper's guardian, out of money which had been left to the pauper. At the time when the pauper ran away from *Quested's* school, about one year and-a-half of the term of five years, which he was by indenture bound to serve the said *John Hunter*, remained unexpired.

Bolland and *Baker*, in support of the order of sessions. The words of the stat. 3 *W & M. c. 11.* are, "that if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation, shall be adjudged a good settlement." Service, therefore, is immaterial; the only thing required is, that the residence should be in
pur-

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The King
against
The Inhabit-
ants of
St. Mary
BREDIN,
CANTERBURY.

1840:

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against
The Inhabit-
ants of
St. Mary,
Barnby,
Canterbury.

pursuance of the indenture. It was indeed held, in the *King v. Swarden* (a), that a mere casual residence would not do; and in *Rex v. Barnby in the Marsh* (b), it was held that a residence during sickness was not sufficient. But these cases are materially distinguishable from this; here the apprentice was bound as a mariner, and the art of navigation was essential to him, and it was for the purpose of improving himself in that essential qualification that this residence at *Canterbury* took place. If he had been there only for the purposes of general improvement, or engaged in any other trade, it would not be sufficient. But here, he was carrying into effect the very purpose for which he had been bound apprentice, and that by the consent of his master. His residence, therefore, at *Canterbury*, was sufficient to confer a settlement.

Barnby, contra, was stopped by the Court.

BAYLEY J. This is a case new in its circumstances, and we are called upon now to lay down a rule which is to govern in future. It has been truly stated, that the words of the statute are only "*such binding and inhabitation*." But I apprehend that the service of the apprentice is one of the essential requisites to confer a settlement of this sort. This service must either actually or constructively be going on during the absence of the apprentice from his master; and the cases say, that where that absence is occasioned by illness, which negatives the existence of such service, no settlement is gained by such a residence. Now there is no continu-

(a) 15 East, 452.

(b) 7 East, 581.

ation of the service here during the residence of the boy at *Canterbury*. It is not indeed necessary that the service should continue with the same master, but some service must be going on during all the time. The offer here is, either to turn the apprentice over to another master, or to permit him to go to school, and the lad accepted the offer, and said, "I will go to school and learn navigation." Now had the master any control over the apprentice during all that period? The case is like that of a master who allows his apprentice to return to his friends, having no occasion for his service. That is a suspension of the apprenticeship for the time, and no settlement can be gained by such residence. Here the service did not continue while the apprentice was at school; and, therefore, I am of opinion that no settlement was gained in this case.

HOLROYD J. The service did not continue while the apprentice was at school; but there was a relinquishment of it by the master during all that time, and until he should have occasion for him again. No settlement was therefore gained by the residence in *Canterbury*.

BEST J. concurred.

Order of Sessions quashed.

1819.

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The KING
against
The Inhabit-
ants of
ST. MARY
BREDIN,
CANTERBURY.

1819.

Saturday,
Feb. 6th.The KING *against* The Inhabitants of TWYNING,
in GLOUCESTERSHIRE.

The law always presumes against the commission of crime; and, therefore, where a woman, twelve months after her first husband was last heard of, married a second husband, and had children by him; held, on appeal, that the Sessions did right in presuming *prima facie* that the first husband was dead at the time of the second marriage; and that it was incumbent on the party objecting to the second marriage to give some proof that the first husband was then alive.

TWO justices removed *Mary Burns*, the wife of *Francis Burns*, an *Irishman*, then absent, and *James* and *Ann* her children, from the township of *Manchester* to the parish of *Twynning* in the county of *Gloucester*. The sessions, on appeal, confirmed the order, subject to the opinion of the Court of King's Bench, upon the following case:

About seven years ago, the pauper *Mary Burns* intermarried with one *Richard Winter*, with whom she lived a few months, when he enlisted for a soldier, went abroad on foreign service, and has never been heard of since. In a little more than twelve months after his departure, the pauper *Mary*, being then settled in *Twynning*, intermarried with the said *Francis Burns*, with whom she has cohabited from the time of such marriage to the present period; the children, mentioned in the order of removal, were born during such cohabitation, and are the children of the said *Francis Burns*. One of them was born in the parish of *Tewksbury*, and the other in a parish in the city of *Worcester*. On the part of the appellants it was contended, that the respondents ought further to have proved the death of *Richard Winter*, prior to the marriage with *Francis Burns*, and that in the absence of such proof, the presumption of law was, that he was then alive, and that consequently the children must be considered as illegitimate, and settled where born, and that as to them, the order ought to be set aside.

The

The sessions were of opinion, that there was sufficient evidence of the non-access of *Richard Winter*, and that the burthen of proof lay upon the appellants, to shew that he was alive at the time of the second marriage, and confirmed the order.

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against
The Inhabit-
ants of
TWYNING,
GLOUCESTER-
SHIRE,

W. D. Evans in support of the order. The only question is, whether this was not a matter of fact, which the sessions were warranted in determining. The presumption must in all cases be against the commission of a crime, and here, unless the sessions were right, the woman must have been guilty of bigamy; and he cited *Williams v. the East India Company*. (a)

Nolan and *Coltman*, contra. Some evidence must undoubtedly be given to negative the presumption that no crime has been committed. But the question is, whether that evidence has not been given in this case. The Court have to consider, not what the presumption now is, as to the death of the first husband, but what it was at the time of the second marriage. Now that was within less than twelve months after the husband's departure. It is laid down in the books, that the presumption of life continues till seven years have elapsed after the party has been heard of, *Doc v. Jesson* (b), *Hopewell v. De Pinna*. (c) Till that time has expired, the presumption of life continues, and in *Wilson v. Hodges* (d), it was laid down that the proof lies on the party asserting the death. Here, therefore, it was necessary for the party who asserted

(a) 3 *East*, 192.(b) 6 *East*, 80.(c) 2 *Campb.* 113.(d) 2 *East*, 312.

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ants of
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SHIRE.**

the validity of the second marriage, to prove the death of the first husband, which was not done, and if the sessions are right in this case, there will be no limit at all, for if a woman marries the week after her husband's departure, it will equally follow that the marriage is valid. This is not like the case of bigamy, but is only a civil suit between two parishes.

BAYLEY J. It is not necessary for the Court in this case, to impugn the authority of the cases which have been cited, nor to vary the ordinary presumption which exists both in civil and criminal cases: for this is a case of conflicting presumptions, and the question is, which is to prevail. The law presumes the continuation of life, but it also presumes against the commission of crimes, and that even in civil cases, until the contrary be proved. The case of *Williams v. East India Company* (a), decided that the onus probandi lay in such cases on the opposite side. For there, in an ordinary case, it would have been the duty of the defendants to have proved the notice; but the Court held, that inasmuch as the delivery of the combustible matter without notice, would have been a crime in the party delivering it, it became necessary for the plaintiff to prove that no such notice had been given. And in *Rex v. Hawkins* (b), where the objection was, that the defendant had not taken the sacrament within the year, and it was said in answer, non constat that the other party had not equally omitted to do so, the Court held, that the presumption was, that he had conformed to the law.

(a) 3 East, 192.

(b) 10 East, 211.

The cases cited only shew, when the presumption of life ceases, even where there is no conflicting presumption. The facts of this case are, that there is a marriage of the pauper with *Francis Burns*, which is *primâ facie* valid, but the year before that took place, she was the wife of *Richard Winter*, and if he was alive at the time of the second marriage, it was illegal, and she was guilty of bigamy. But are we to presume that *Winter* was then alive? If the pauper had been indicted for bigamy, it would clearly not be sufficient. In that case *Winter* must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved, but the answer is, that the presumption of law is, that he was not alive when the consequence of his being so is, that another person has committed a criminal act. I think, therefore, that the sessions decided right in holding the second marriage to have been valid, unless proof had been given that the first husband was alive at the time.

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against
The Inhabit-
ants of
TWYNING,
GLOUCESTER-
SHIRE.

BEST J. (a) I am also of opinion that the sessions have decided correctly in this case. They had a right to presume that the pauper had not committed a crime, and if so, the second marriage would be valid, unless proof had been given of the first husband being then alive. The cases cited are very distinguishable, they only decide that seven years after a person has been last heard of, you are in all cases to presume his death. But they do not shew, that where conflicting presumptions exist, you may not presume the death at an earlier period. Now, those conflicting presumptions exist here, and I think the sessions were

(a) Holroyd J. had left the Court.

C c 3

warranted

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against
The Inhabit-
ants of
Twickenham,
Gt. London.

warranted in presuming the death of the first husband, on the ground that they would not presume that the woman had committed bigamy. I think, therefore, that their order was right.

Order of Sessions confirmed.

Monday,
Feb. 5th,

PAGE against VOGEL.

Defendant not
entitled to an
imprisonment
where he has
by his own act
prevented plain-
tiff from declar-
ing within the
term.

THIS action was brought by the plaintiff, as assignee of a bankrupt. The writ was returnable in last term, and special bail was perfected in time for the plaintiff to have declared as of that term; but on the very day that bail was so perfected, the defendant obtained a Judge's order for particulars of demand, with a stay of proceedings in the mean time. The defendant was examined before the commissioners of bankrupt, and admitted in his first examination, that he had books containing accounts of all his transactions with the bankrupt. The commissioners committed him to *Newgate* for prevarication. On his second examination, on the 7th December, he stated that he had also bills of parcels of every transaction which he had had with the bankrupt, and he promised to allow the assignees to inspect the same. On the following day, however, he went abroad, and although repeated applications had been made to the defendant's attorney, to allow the assignees to inspect the bills of parcels or books, he had always refused so to do. The bankrupt himself had absconded, and taken away all his books. It was sworn, that the plaintiffs would have declared as of last term, if the defendant had not obtained a Judge's order to stay proceedings, or if he had enabled them, by inspection of the books of account or bills

bills of parcels, to furnish the particulars of demand. The bankrupt returned only on the day before this term; and on the 3d *February*, a declaration and particulars of demand were delivered, and on the 9th, judgment was signed, as for want of a plea. A rule nisi having been obtained by *F. Pollock* to set aside this judgment for irregularity, on the ground that the defendant was entitled to an imparlance.

1819.

 PAGE
 against
 VOYER.

Curwood now shewed cause, and contended, that the defendant himself had been the cause of the delay, and therefore was not entitled to an imparlance.

Per Curiam. The ground upon which a defendant is entitled to an imparlance, is, that the plaintiff has taken time; and therefore that the defendant ought also to have time. We will not here lay down any general rule that the defendant is entitled to an imparlance in every case where the plaintiff has been delayed in declaring by the defendant's obtaining a Judge's order for particulars; here, however, it is perfectly clear that the delay has been occasioned by the defendant's own act; and it might as well be contended that he would be entitled to an imparlance if he had obtained an injunction, and so prevented the plaintiff from declaring. The defendant, however, producing an affidavit of merits, the Court set aside the judgment on payment of costs.

Rule absolute on these terms.

1819.

Tuesday,
Feb. 9th.ROWSELL *against* Cox.

A plea of comperuit ad diem on debt on bail bond must be delivered.

A RULE nisi had been obtained for setting aside the judgment for irregularity. It was an action of debt on a bail bond. A plea of comperuit ad diem had been filed within the time allowed by the rule for pleading, but was not delivered, and judgment was signed for want of a plea.

The Court held that such a plea ought to have been delivered, and not filed.

Tuesday,
Feb. 9th.HENDERSON *against* SANSOM.

A general plea of bankruptcy must be delivered, and not filed.

IN this case, the action was commenced in *June*, the declaration was filed in *December*, to plead within the first four days of *Hilary* term. The defendant, within that time, filed a general plea of bankruptcy, and the plaintiff afterwards signed judgment as for want of a plea. It was urged in this case that in *Tidd's Practice* it was stated only that such a plea *may* be delivered.

The Court, however, after consulting with the Master, said that by the practice of the Court such a plea must be delivered.

1819.

DEACON *against* MORRIS.

THIS was an action founded on the 29 *Eliz. c. 4.* which gives treble damages against sheriffs or other officers for taking more upon a levy of execution upon the plaintiff's goods than the fees allowed by that act. The Master, after a verdict had been obtained for the plaintiff, had only taxed single costs; and

Wednesday,
Feb. 10th.

In an action on the 29 *Eliz. c. 4.* plaintiff is entitled to treble costs as well as treble damages.

Marryat having obtained a rule nisi for the Master to review his taxation, on the ground that as the statute expressly gave treble damages, it must be intended by implication that the plaintiff was also entitled to treble costs.

Chitty now shewed cause. In *Tyte v. Glode (a)*, it was doubted whether any costs at all were recoverable under this statute; at all events, however, as nothing is expressly said in the act about costs, the plaintiff can be entitled only to such costs as he would have in other cases, viz. single costs.

Per Curiam. Where an act of parliament gives treble damages for a cause of action, for which at common law a party would only be entitled to single damages, treble costs follow as of course. In ordinary cases the party recovers damages, being so much for the damages by him sustained, and so much for his costs; the costs, therefore, are part of the damages, and consequently the act of parliament, by giving treble damages, impliedly gives treble costs.

Rule absolute. (b)

(a) 7 *Term Rep.* 267.

(b) See *Wilkinson v. Allot, Comp.* 368.

1819.

Thursday,
Feb. 11th.COOPER *against* JOHNSON.

The authority
of an arbitrator
is determined
by the death of
either party be-
fore the award.

THIS cause was referred, in *June*, 1818, by order of *Nisi Prius*, to an arbitrator, and a verdict was entered for the plaintiff for the damages in the declaration, subject to the award. The parties and their witnesses had attended the arbitrator, but before any award was made, the defendant, on the 29th *December* died. The arbitrator, after being informed of that fact, made his award in *January*. A rule nisi had been obtained for liberty for the plaintiff to sign judgment in pursuance of the award, and for reviving the same against the executors.

Gurney now shewed cause against the rule, and relied upon the case of *Potts v. Ward (a)*, as an authority, to shew that the death of either party, before the making of the award by the arbitrator, was a revocation of his authority.

Adams, contra, contended, that a verdict having been here taken for the plaintiff, this case fell within the policy of the statute 17 *Car. 2. c. 8.*, by which it was expressly enacted, that the death of either party, between the *verdict* and the judgment should not be alleged for error, provided the judgment be entered within two terms after such verdict.

ABBOTT C. J. It is of great importance, that the decision of both Courts should be the same upon this

(a) 1 *Mart.* 366.

point.

point. The Court of Common Pleas has already decided in the case cited, that the death of either party is a revocation of the arbitrator's authority, and that decision ought to be abided by. It may be very proper, in orders of Nisi Prius in future, to insert a clause to obviate the inconvenience arising from the death of either party, before the making of the award.

Rule discharged.

1819.

COOPER
against
JOHNSON.

ASTON against GEORGE.

Thursday,
Feb. 11th.

THIS cause in *July*, 1817, had been referred to an arbitrator by a Judge's order, directing, among other things, "that if either party should, by affected delay or otherwise, wilfully prevent the arbitrator from making an award, he or she should pay such costs to the other, as this Court should think reasonable and just." In pursuance of this order, the parties and their witnesses attended the arbitrator, and proceeded in the reference for several successive days. On the 18th *December*, 1817, and before any award was made, the defendant, finding that she could not procure the attendance of several witnesses named in the affidavits, whose expences she had tendered, revoked the submission. It was positively sworn that she revoked the submission solely on that account, and under legal advice. The Judge's order was not made a rule of court until the first day of this term, and a rule had been obtained by *Littledale* for taxing the plaintiff's costs, occasioned by and incident to the reference; and on the other hand, *Hullock*, Serjt. obtained a rule nisi for discharging the rule making the Judge's order a rule of

A Judge's order directed that a cause should be referred, and that either party wilfully preventing the arbitrator from making an award by affected delay or otherwise, should pay such costs as the Court thought reasonable and just: Held that such order might be made a rule of Court after one of the parties had revoked the authority of the arbitrator.

But, secondly, where the authority was revoked because the party could not procure the attendance of material witnesses before the arbitrator, the Court refused to allow any costs.

Court,

1819.

—
 Aston
 against
 Grouse.

Court, on the ground that it ought not to have been made a rule of Court after the revocation; and against this latter rule

Littledale now shewed cause. If this application succeed on the ground that the submission was revoked before the order was made a rule of Court, a reference by order of *Nisi Prius* will in future be used as a means of delay, for the order cannot be made a rule of Court till the ensuing term; and the party may in the mean time revoke the authority. In the case of a submission by deed, the party has a remedy upon the deed, although the submission be revoked; but in this case he has no other remedy.

Hullock, Serjt. and *E. Lawes*, contra. The Court of Common Pleas, in *King v. Joseph* (a), held, that the submission, which was by deed, ought not to be made a rule of Court after it had been revoked. A Judge's order, until it is made a rule of Court, contains only an agreement to refer, and therefore does not differ in principle from the case of a reference by deed or agreement; and they cited *Tremenhere v. Tresillian* (b), and *Milne v. Gratrix*. (c) Besides the party is not without a remedy, for he may maintain a special action on the case, for breach of the agreement to refer.

ABBOTT C. J. It seems to me, that there is a material distinction between a reference under a Judge's order and a reference by deed. In the latter case, the submission to arbitration is alone made a rule of Court,

(a) 5 Taunt. 452.

(b) *Sid.* 452.

(c) 7 East, 608.

by

by virtue of the statute. It follows, therefore, that when the submission is revoked, there remains nothing which can be made a rule of Court. A Judge's order, on the other hand, may be made a rule of Court, without reference to any statute. The order in this case contains not only the submission of the parties, but also a direction, that either party shall, under certain circumstances, pay such costs to the other as the Court shall think reasonable and just. Supposing, therefore, that either party may revoke the order, as far as regards the submission, it is still competent to the other party to make it a rule of Court, in order to enforce the other parts of the order. I think, therefore, that the Judge's order was properly made a rule of Court, and that this rule must be discharged.

BAYLEY J. I am of opinion that a Judge's order does more than a mere submission by bond or agreement. The Judge's order contains a direction enabling the Court, under certain circumstances, to exercise a discretion on the subject of costs; and how are we to form any judgment what costs are reasonable and just unless the order be made a rule of Court.

HOLROYD J. I am of the same opinion. Supposing that the party might revoke his submission, still he had no authority to revoke the other part of the order; that part, at all events, therefore, ought to stand, and the order was properly made a rule of Court.

BEST J. concurred.

Hullock Serjt. and *E Larves* now shewed cause against the rule for taxing the costs of the reference.

Under

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—
ASTON
against
GEORGE.

1819.

Aston
against
Gronow.

Under the circumstances, the revocation of the submission was justifiable; for the defendant could not obtain the evidence of witnesses who were most material to her defence, and whose attendance might be compelled in a court of law. She cannot, therefore, be said to have wilfully prevented the arbitrator, by affected delay, from making his award within the meaning of the order.

Littledale, contra. The words of the order are *affected delay or otherwise*, and it is clear that the arbitrator has been prevented from making an award, by the act of the Defendant, who ought, therefore, to pay to the plaintiff the costs which he has incurred in the reference. The defendant, indeed, ought to have ascertained, before any expence was incurred by the plaintiff in attending the arbitrator, whether she could procure the attendance of those witnesses whom she deemed material to her defence.

ABBOTT C. J. By the terms of this order it is directed that if either party shall, by affected delay or otherwise, wilfully prevent the arbitrator from making an award, he or she shall pay such costs to the other as the Court shall think reasonable and just: and I think that giving a fair and liberal construction to these words, the Court has no power to direct any costs except where the party, by wilful, wrongful, or unreasonable delay, has prevented the arbitrator from making an award. The motive here for revoking the submission was because the party could not procure the attendance of material witnesses, and that cannot be considered as an affected delay within the meaning of the
the

the order. I am, therefore, of opinion that this rule must be discharged.

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Aston
against
George.

BAYLEY J. I am of the same opinion. The word *otherwise* must be taken to be *ejusdem generis*, with the words, *affected delay*; and the word *wilfully* has the same meaning, in this instance, as *wrongfully*. Now I cannot say that a party who has revoked the submission, merely because she could not procure the attendance of material witnesses, has therefore wrongfully prevented the arbitrator from making his award.

HOLROYD J. I am of the same opinion. I think that the fair meaning of the terms of this order are, that the Court should direct costs only in those cases where they have been incurred by the misconduct of the party sought to be charged with costs. Here the submission was revoked merely because the defendant could not obtain the attendance of witnesses whose attendance might be compelled in a court of law. I cannot, therefore, say that any costs were incurred by the misconduct of the defendant, or that she wilfully prevented the arbitrator from making his award by affected delay or otherwise within the meaning of this order.

BEST J. concurred.

Both Rules discharged.

1819.

GUNN *against* HONEYMAN.Thursday,
Feb. 11th.

A rule for a special jury must be served sufficiently early to enable the opposite party to strike the jury before the day of trial, and therefore, where the rule was served at six o'clock on the evening preceding the day fixed for the trial, it was held, that the cause was properly tried by a common jury.

A RULE had been obtained to set aside the verdict in this cause for irregularity. On the 29th *January*, notice of trial had been served on the defendant's attorney, for the second sittings in this term, which were fixed for half past nine o'clock, in the morning of the 6th of *February*; on the 1st of *February*, the cause was entered in the Marshal's book; on the 4th, a rule for a special jury was obtained, and the Chief Justice's clerk then marked the cause in his book as a special jury. The rule for a special jury, with an appointment to nominate, was served on the plaintiff's attorney about six in the evening, on the 5th *February*, and on the 6th, the plaintiff tried the cause by a common jury.

Barrow and *Dehany* now shewed cause, and contended, that in order to make the rule for a special jury a supersedeas to the common jury, it ought to have been obtained and served sufficiently early to enable the party to strike the jury, before the time appointed for the trial of the cause.

Littledale, contra, said, that in ordinary practice, it was sufficient to serve the rule for a special jury, the day before the adjournment day, and therefore, that by analogy in this case the service was sufficient.

ABBOTT C. J. It is not necessary to lay down any precise rule, as to the number of days and hours that ought to intervene between the service of the rule and the time appointed for trial, in order to make the
special

special jury a supersedeas of the common jury process. It is sufficient to say here, that the rule should be served early enough to enable the other party, by using in the usual course of business ordinary diligence, to insure the attendance of a special jury. Here the rule was served so late, that it was impossible for the defendant to obtain the attendance of a special jury upon the day appointed for the trial. I therefore think that the rule should be discharged.

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against
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BAYLEY J. I am of the same opinion. Common sense pronounces the rule to be, that the cause is to be tried by a common jury, unless it be put in a condition to be tried by a special jury; and that is not done unless the rule be served sufficiently early to enable the other party to strike the special jury; I am of opinion, therefore, that this rule should be discharged.

HOLROYD and BEST Js., concurred.

Rule discharged.

1819.

MARTIN *against* FRANCIS.

The plaintiff's attorney directed the sheriff's officer, who had arrested the defendant, not to let him go at large without an express consent from him, the attorney, as he had a lien for his costs. The sheriff's officer did, by the authority of the plaintiff in the action, but without that of the attorney, let the defendant go at large: Held that the sheriff was not liable to the attorney for his costs.

IN this case the defendant was arrested for 140%.

The plaintiff's attorney had given directions to the sheriff's officer not to discharge the defendant under any authority from the plaintiff, without the consent of the attorney, he stating that he had a lien for his costs. The officer promised that he would not discharge the defendant without such consent; notwithstanding which he did discharge him by the authority of the plaintiff in the cause. A rule nisi had been obtained by *Chitty*, calling upon the sheriff to pay to the plaintiff's attorney 7*l.* 10*s.*, the costs of the action and also the costs of this application.

Holt now shewed cause. This is a novel application, to compel the sheriff to pay the costs of the plaintiff's attorney, and if it succeed, the effect of it will be, to extend the lien of the attorney to the person of the defendant. The case of *Withers v. Hensley* (a), is however an authority to shew, that the sheriff was not only justified, but that he was actually bound to discharge the defendant at the command of the plaintiff; and if so, there is no pretence for this application.

Chitty, contra. In *Welch v. Hote* (b), Lord *Mansfield* said, that if an attorney gave notice to the defendant not to pay the debt till his bill should be discharged, the payment even by the defendant, after such notice,

(a) *Cro. Jac.* 379.(b) 1 *Dougl.* 238.

would

would be a payment in his own wrong; and if a payment, even by the defendant himself, could not be supported, the attorney is not to be deprived of his lien by the defendant paying his debt; he ought not to be deprived of it by the act of the officer, in letting the defendant go at large without his consent. The sheriff is not liable to an action for false imprisonment until a supersedeas issues.

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Per Curiam. The effect of the argument is, that the sheriff is bound, upon the representation of the attorney, to detain the defendant in custody until he has the consent of the attorney to discharge him; so that even if the plaintiff had been paid the costs before he had consented to the discharge, the sheriff, according to the argument, would still be bound to detain the defendant. We are, however, of opinion, that the defendant cannot be detained if the plaintiff is satisfied. The liability of the sheriff in such cases ought not to depend upon the truth or falsehood of the communication made to him by the attorney; nor ought the burden of inquiring into the fact, whether a lien exists or not, to be thrown upon the sheriff.

Rule discharged with Costs.

REGULA GENERALIS.

Hilary Term, 59 G. 3.

WHEREAS it appears, that the effect of so much of the rule of this court, of *Hilary* term 57 G. 3., as directs that the Master of the Crown Office do, from time to time, as well in vacation as in term-time, visit the the King's Bench prison, and do the several
acts

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Order of
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acts required of him by the said rule in that behalf, may be obtained more fully and satisfactorily if such visitations of the prison should be held under orders made from time to time by this Court in term-time, or by one of the Judges of the court in vacation. It is hereby ordered, that so much of the said rule as orders that the Master of the Crown Office do from time to time, as well in vacation as in term-time, visit the King's Bench prison, and do the several other acts required of him by the said rule in that behalf, be, and it is hereby discharged. And it is hereby ordered, that if any petition, verified by affidavit, complaining of any grievance within the said prison, shall be delivered by any prisoner to the marshal or any of his officers, for the purpose of being presented to the Court in term-time, or to one of the Judges thereof in vacation, the marshal, or such officer to whom the same shall be delivered, shall forthwith present the same accordingly, and without fee or reward, to any person whatsoever, directly or indirectly in that behalf.

By the Court.

In the course of this term *Vitruvius Lawes*, Esq. of the *Inner Temple*; *John Cross*, Esq. of *Lincoln's Inn*; and *John Doyley*, Esq. of the *Middle Temple*, were called to the degree of Serjeants at Law. They gave rings, with the motto "*Pro Rege et Lege*."

END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

1819.

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fifty-ninth Year of the Reign of GEORGE III.

STEPHEN SHARP and Another against DANIEL SHARP. (a)

Wednesday,
April 28th.

DECLARATION stated that one *D. Sharp*, since deceased, was lawfully possessed of a certain large personal estate, and was also seised in his demesne, as

A. by his will bequeathed to *R. S.* and *R. L. R.* a sum of money upon trust; and to

M. S., *R. S.*, and *G. A. D.*, certain personal property upon trust; and then devised his real property to *R. S.* and *G. A. D.*, also upon trust; and then directed that if either of his trustees, the said *R. S.* and *R. L. R.*, so far as applied to the trusts reposed in them respectively, or the said *M. S.*, *R. S.*, and *G. A. D.*, so far as applied to the trusts reposed in them respectively as aforesaid, should decline to act, &c., it should be lawful for the survivor of the trustees so acting in the trusts wherein such vacancy should happen, or the executors or administrators of the last surviving trustee, to appoint other trustees: Held, first, that this power only extended to the two first classes of trustees, and not to the trustees of the real estate; held, secondly, that it was not well executed by the two trustees, both of whom had wholly declined to act in the trust.

(a) The Judges of this court sat at *Serjeants' Inn* on *Thursday* the 22d day of *April*, and on the succeeding days till the term, and heard this and several of the following cases argued by counsel, and delivered their opinions as on former occasions, (see p. 1.); and the Court afterwards gave judgment on the day on which the cases are now reported.

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of fee, of and in certain real estates, to wit, a certain dwelling-house, and certain buildings, gardens, and premises, situated, &c. wherein he, the said *D. Sharp*, then resided, and of and in divers other real estates situated in the same parish, and in the parish of *Shalford*, in the same county; and being so seised thereof, he, the said *D. Sharp*, duly made his last will and testament in writing, duly executed to pass real estates, and thereby, after giving and bequeathing divers specific and pecuniary legacies, gave and bequeathed to his friends *R. Sharp* and *R. L. Rice* 1000*l.*, upon trust to invest the same in government or real security, and to pay the interest thereof to his daughter *Elizabeth Clarke* for her life, and after her decease, to apply the said sum for her children, &c. &c.; and all the residue of his personal estate he gave and bequeathed to his wife, *Mary Sharp*, and the said *R. Sharp* and his friend *G. A. Davis* of *London*, merchant, and to the survivor and survivors of them, and to the executors and administrators of the last survivor of them, upon divers trusts therein mentioned, and the testator also gave and devised unto his wife and her assignees, during her natural life, the said dwelling-house, &c.; and also devised unto the said *R. Sharp* and *G. A. Davis*, and to the survivor of them, and to the heirs of such survivor, all his real estates whatsoever situate in the parishes aforesaid, upon trust to receive the rents and profits as the same should become due, to pay the same to his wife for her life; and from and after her death he gave and devised his said last-mentioned real estates, and also his said dwelling-house, &c., unto the said *R. Sharp* and *G. A. Davis*, and to the survivor of them, and the heirs of such survivor, upon trust, and after the

death of his wife, to sell the same; and he directed that the receipt of the said trustees, or the survivor of them, or the heir of such survivor, should be a good discharge for the purchase-money; and then came a proviso, that in case either of his said trustees, the said *R. Sharp* and *R. L. Rice*, so far as applied to the trusts reposed in them respectively, or the said *Mary Sharp*, *R. Sharp*, and *G. A. Davis*, so far as applied to the trusts reposed in them respectively as aforesaid, should happen to die, or desire to be discharged from, or neglect, or refuse, or become incapable to act in the trusts thereby in them reposed, before such trusts should be fully performed or determined; in such case it should be lawful for the survivors or survivor of the trustees so acting in the trusts wherein such vacancy should happen as aforesaid, or the executors or administrators of the last surviving trustee, by any writing under their or his hand and seal, to be attested by two or more credible witnesses, from time to time to nominate and appoint any other person or persons to be a trustee in the place of the trustee or trustees so dying, desiring to be discharged, or refusing, or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees should be so appointed as aforesaid, *all the trust estates, monies, &c.* should be conveyed and assigned, so that it might be legally vested and continued in the surviving or continuing trustee or trustees, and such new trustee or trustees; or if there should be no continuing or surviving trustee, then in such new trustee or trustees only upon the same trusts, &c. as were thereinbefore declared concerning the same trust estates, monies, &c. The declaration then stated that *D. Sharp* died seised and

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possessed as aforesaid, without having revoked or altered his will, and that *R. Sharp* and *G. A. Davis*, by the said devise, were seised of the remainder of the said dwelling-house, &c., from and after the death of *Mary Sharp* as of fee and right, and of the said other real estates in their demesne as of fee; and being so seised, the said *R. Sharp* and *G. A. Davis* before the said trusts were fully performed or determined, to wit, on the 17th *February*, 1815, refused to act in the said trusts reposed in them, and thereupon, by a certain indenture of bargain and sale made by and between the said *R. Sharp* and *G. A. Davis*, and the said *S. Sharp* and *R. Winter*, for a certain consideration, bargained and sold the said remainder, and the other real estates, to the said *S. Sharp* and *R. Winter* habendum for one year; by virtue whereof, and by force of the statute for transferring uses into possession, the said *R. Winter* and *S. Sharp* became possessed of the same accordingly, and being so possessed, and the said *R. Sharp* and *G. A. Davis* being seised of the reversion thereof they, by release attested by two credible witnesses, released the same reversion unto the said *S. Sharp* and *R. Winter*, and to their heirs. The declaration then stated that the plaintiffs being seised as aforesaid, *Mary Sharp* on the 31st *September*, 1816, died, upon whose death the plaintiffs came to be seised of the dwelling-house, &c. in their demesne, as of fee, and that from thenceforth they have been seised of the said dwelling-house and of all the other real estates, upon the trusts mentioned in the will, and that being so seised they offered the same for sale, and that by a certain agreement, made between plaintiffs and defendant, they agreed to make a good title, both at law and equity, upon payment of the purchase-

chase-money, and to convey the said real estates unto the defendant in fee-simple, and that the defendant agreed upon such good title being made, and upon such conveyances being executed, to pay the purchase-money. The declaration then stated mutual promises, and averred that the plaintiffs delivered to the defendant a faithful abstract, and made a good title both at law and equity from the testator, enabling them to convey the estate in fee-simple upon payment of the purchase-money, and that they offered to defendant to convey the same to him upon payment of the purchase-money. The declaration then alleged, as a breach of the agreement, that defendant, although requested, had not paid the purchase-money. To this declaration there was a general demurrer and joinder. The case was now argued by

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Sugden, in support of the demurrer. The first question is, whether the power to appoint new trustees extends to *R. Sharp* and *G. Adams Davis*, the trustees of the real estate; and, secondly, assuming that to be so, whether the power, which in terms is to the surviving trustee, is well executed by the two trustees. Here the testator has appointed three classes of trustees; first, *R. Sharp* and *R. L. Rice*, as trustees for a particular fund; secondly, *Mary Sharp*, *R. Sharp*, and *G. A. Davis*, as trustees of his personal property; and, thirdly, *R. Sharp* and *G. A. Davis*, as trustees of his real property. Now the words of the power are, that in case either of his said trustees, the said *R. Sharp* and *R. L. Rice*, so far as apply to the trusts reposed in them respectively, or the said *Mary Sharp*, *R. Sharp*, and *G. A. Davis*, so far as apply to the trusts reposed in them respectively as

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aforesaid, should happen to die, &c., in such case, &c. Now the word "respectively" does not apply to each of the trustees individually, but to the class, and as the testator has expressly appointed three classes of trustees, and as in the power he has named only two out of three, he cannot have intended to have extended this power of appointment to the third class of trustees, viz. the trustees of the real property; assuming, however, that to be otherwise, the power of appointment is confined to the *survivor* of the trustees continuing to act: here it is executed by two who never, at any time, acted in execution of the trusts. And the power is to the survivor or to the *executor or administrator* of the survivor, which shews that the power is confined to the trustees of the personal and not of the real property. The trust for sale, on the other hand, is to the two trustees, and the *heirs* of the survivor, and the receipt of the *heir* of the surviving trustee is to be a good discharge to the purchaser; and it is clear, therefore, that the testator contemplated the event of one trustee only acting in execution of the trusts, and that he did not intend that there should always be two. *McAdam v. Logan* (a) is an authority in point; there the power was to the survivor of husband and wife: it was executed by the husband and wife jointly; and Lord *Thurlow* held that to be an invalid execution of the power. Here also both decline to act; neither, therefore, can be said to have filled the character of a trustee, *acting* in execution of the trusts, to whom alone the power of appointing other trustees is expressly confined by the very terms of the proviso. *Townsend v. Wilson* (b) is the

(a) 3 *Brown, Ch. Cas.* 310.(b) 1 *Barn. & Ald.* 608.

converse

converse of this case, and is an authority to shew with what strictness the Court construe these powers.

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Preston contra. The Court will so construe this power as best to effectuate the intention of the testator. Now it is clear that the testator intended that his real property should vest in the *new trustees*; for it is expressly provided that all the trust estates, &c. are to vest in the new trustees. And, the term *estate* only applies to his real property; and if the construction contended for prevail, the real property can never vest in the new trustees. The words of the power are, That if *either* of my said trustees, *R. Sharp* or *R. L. Rice*, so far as applied to the trusts reposed in them *respectively*: the word *respectively* must be construed distributively, and then it will be, If either of them, *R. Sharp* or *R. L. Rice*, refuse to act, &c., another may be appointed; and as another may be appointed if either refuse to act, two may be appointed if both refuse to act. And inasmuch as the said *R. Sharp* and *G. A. Davis* are both named in the power, and as they are the trustees of the real estate which the testator intended to pass to the newly-appointed trustees, they, in order to effectuate the intention, must be considered as included within that power. By assuming that to be so, the power of appointment extends to all the trustees who are willing to execute any of the purposes of the will. The execution of the power of appointment is a purpose of the will; and *Crew v. Dickins* (a) is an authority to shew that the very act of conveying an estate to another is an acceptance of the trust; and here the intention of the testator will be satisfied, if the

(a) 4 Ves. jun. 100.

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parties act in execution of the power. The power here given is to the trustees acting in that character; and every trustee comes within the meaning of the term, surviving trustee. The trustees became trustees upon the death of the testator; and they must have continued to fill that character until they were discharged by the means pointed out in the will, or by the intervention of a court of equity. The words "surviving trustees" were used in the sense of acting, or remaining, or continuing trustees, and *Roe, dem. Vere, v. Hill* (a), and *Goodtitle v. Laymen* (b), are authorities to shew that the word surviving admits of this application.

ABBOTT C. J. The Court cannot introduce any power into this will which the testator himself has not expressly given; although they may be of opinion that if he had contemplated the event which has happened, he would have introduced a special power to provide against it. It appears that three classes of trustees are appointed for three different purposes: first, *R. Sharp* and *R. L. Rice*, as to the £1000; then as to the rest of the personal estate, *Mary Sharpe*, *R. Sharp*, and *G. A. Davis*; and then, as to the real estate, *R. Sharp* and *G. A. Davis*. The will then contains a power that in case either of his said trustees, *R. Sharp* and *R. L. Rice*, so far as applied to the trusts reposed in them respectively, or the said *Mary Sharp*, *R. Sharp*, and *G. A. Davis*, so far as applied to the trusts reposed in them respectively, as aforesaid, should happen to die, or desire to be discharged from, or neglect or refuse, or become incapable to act in the trusts thereby in them

(a) 3 Burr. 1881.

(b) *Fearne, Cont. Rem.* 358.

reposed,

reposed, before such trusts should be fully performed or determined, in such case it should be lawful, &c. Now I think these words plainly denote, that the two first trustees are to be distinguished as a separate class; and the second sentence, which applies to the other three, has the same confined meaning. If so, the whole power is given to the persons named in classes, and no power at all is given to the third class, who are not named. But supposing the will had gone on, and given the same power to the said *R. Sharp* and *G. A. Davis*, so far as the trusts apply to them, still I should be of opinion that it would not be sufficient to enable these two to nominate two other persons, to execute the trusts which the testator had reposed in them. For the power given is in these words, "That it should be lawful for the *survivors or survivor* of the trustees so acting in the trusts, &c." Now, by the word survivor, I understand merely the trustee continuing to act; for it seems to have been throughout the intention of the testator, that in case of the death, or incapacity, or refusal of some one of the trustees, the remaining trustee, who had been named by him, and who had been the object of his confidence, should have the power of associating with himself some other person in the execution of the said trust. But it would be giving a much larger construction to these words than they fairly import, if we were to say that the trustees, in the event of the whole class declining to act, might nominate such other persons as they might think fit to perform their duties. I am therefore of opinion, on both these grounds, that there should be judgment for the Defendant.

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BAYLEY J. I am of the same opinion, upon both points. There are three sets of trustees: the first are

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R. Sharp and *R. L. Rice*; the second are *R. Sharp*, *Mary Sharp*, and *G. A. Davis*; and the third, *R. Sharp* and *G. A. Davis*. The question is, whether this power applies to the case in which *Sharp* and *Davis* were the sole trustees of the real estate, or whether it is confined to the first two classes of trustees only. In order to sustain the present action, we ought to see clearly that it was the intention of the testator to include in the power all these three classes of trustees. Now, looking at the words, so far from that intention being clear, I think the inference is the other way. It has been argued, that in the power, as all the trustees are named, it must have been the intention of the testator to extend it to all the trustees individually. But *R. Sharp* is twice named in the power, with reference to two of the trusts; and it would have been perfectly useless to have named him more than once, if the intention had been to extend the power to the trustees individually. It has been said that this falls within the words used by the testator; for those words are, 'That if *Mary Sharp*, *R. Sharp*, and *G. A. Davis*, refuse to act, &c., then new trustees might be appointed; and that *R. Sharp* and *G. A. Davis* have refused to act. But what is the trust to which the words used by the testator apply? Why, to the trust reposed in *them respectively*, viz. in the three respectively, which shows that it is confined to the trust relative to the personal, and not to the real estate. It seems to me, therefore, that no power is given to *R. Sharp* and *G. A. Davis*, as trustees of the real estate; for every word of the power is inconsistent with such a construction. The words are, "Provided that in case either of my said trustees." And the word *either* is not uselessly introduced: it is in effect a proviso, that if either of the trustees named in the will should refuse to act,

still

still that the testator should have the benefit of the judgment of the other, who would act in concurrence with such other individual as he might nominate. Now the testator may have had good reason in confining the power to the case of one trustee, for he may have had special confidence in the trustees named by himself; and so long as either of those persons acted in the trust, he might think his property safe. But if we were to read these words as if they were *both* or *either*, the case would be different. If both the persons should decline to act, a testator might naturally object to their delegating their trust to other persons, and might then have thought it better that his property should be left to the care of a court of equity. The power, then, goes on further to state, "That if the trustees shall refuse to act before the trusts shall be fully performed, it should be lawful for the *survivor* of the trustees so *acting* in the trust to appoint, &c." Now, I apprehend that under the words of this power, the testator meant by the word *acting*, to designate those who had taken upon themselves to perform some of the trusts mentioned in the will; and that he did not contemplate one who in limine refused to act. And it seems to me that a person who does so refuse cannot be considered as *acting* in any of the trusts. Then the word *survivor* must mean the continuing trustee, as contradistinguished both from those who might refuse to act, and those who might be desirous to discontinue acting. For these reasons, it seems to me that the power is confined to the persons specifically pointed out in the will, viz. the trustees of the personal property; and that even if it could be extended to the trustees of the real property, it would not apply to a case where both those trustees had refused to act in the first instance.

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HOLROYD J. I am also of opinion, that upon both these points the Defendant is entitled to the judgment of the Court. With respect to the first, it seems to me quite clear that the power of appointing new trustees does not extend to the trustees of the real estate; and that such power, in either of the classes of trusts named, is given only to the continuing trustee. I construe the proviso in this way:—in case either of the trustees, *R. Sharp* or *R. L. Rice* (who are trustees for a particular purpose) shall die, or refuse to act, the continuing trustee in that particular trust may appoint another in his place; and in like manner, as to the other trust, if *R. Sharp*, *Mary Sharp*, and *G. A. Davis*, or any one of them, shall decline to act as a trustee, the same power is given to the survivor or survivors, viz. that the trustee who continues to act is to appoint another in lieu of the person who shall so refuse. That it does not extend to the real estate is clear; for where a power is given for the appointment in the case of the death of a trustee, it is given, not to the *heir* in whom the real estate would be vested, but to the executor or administrator of the last surviving trustee. I also think, that no power of appointment was intended to be given, except to a trustee who had consented to *act*; and that on a refusal by one to act, the vacancy is to be filled up by the other who continues to act; or, in the case of the trust given to the three, if two refuse to act, the whole power is given to the acting trustee. Here, both the trustees have refused to act; and I am therefore of opinion, that on this ground, also, they have no right to substitute other persons in their place.

BEST J. I am clearly of the same opinion, on both points. The testator has, by his will, appointed three
sets

sets of trustees; and if he had intended, that in the event of all of those trustees refusing to act they should be at liberty to appoint new trustees, he might in general terms have said, .If any of my trustees refuse to act, the remainder may appoint others. But by the terms which he has used, I think it perfectly clear that he intended the power of appointment to extend only to the two classes of trustees therein mentioned. Upon the other point, I entirely agree with the rest of the Court, that the authority to appoint other trustees does not extend to a case where all have refused to act; and therefore I think that our judgment ought to be for the defendant.

Judgment for the defendant.

BLANCKENHAGEN and Another *against* BLUNDELL. (a)

Wednesday,
April 28th.

DECLARATION alleged that the defendant, on the 24th May, 1817; made a promissory note, and delivered the note to the plaintiffs; by which note defendant promised to pay to *J. P. Damer*, then of *Rio de Janeiro*, or to the plaintiffs, or to his or their order, 250*l.* sterling, in *Portuguese* currency, at the rate of 57*d.* sterling per mil-ré, together with interest from the 27th July, one-half at fourteen, and one-half at 26 months, from the date, *value received*; whereby, and by force of the statute, the defendant became liable to pay, &c., and being liable, promised, &c. The declaration then stated, that the money mentioned in the note became due, according to the tenor and effect thereof; yet that the defendant, although often requested, had not paid

A note, whereby the maker promised to pay to *A.*, or to *B.* and *C.*, a sum therein specified, value received, is not a promissory note within the meaning of the statute of *Anna*.

An action cannot be maintained at common law upon such an instrument, even by the payee against the maker, although it is stated on the face of the note to be given for value received.

(a) This case was argued at *Serjeants' Inn*.

the

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the same to the plaintiffs, nor had he paid the same to *Damer*. The second count was upon the same promissory note; but only alleged a general liability to pay, without treating it as a promissory note within the statute of *Anne*. The third count was similar to the first, with the exception that it contained an averment that *Damer* died before the note became payable. To this declaration there was a general demurrer, which was now argued by

Espinasse, in support of the demurrer. No action is maintainable on any such instrument as this, unless it be a promissory note within the statute of 3 & 4 *Anne*, c. 9., *Trier v. Bridgman*. (a) The second count of the declaration cannot therefore, at all events, be supported. But, secondly, this is not a promissory note within the meaning of that statute; for it is not payable to either of the payees, at all events, but only on the contingency of its not having been paid to the other; and a bill of exchange in this form would not be negotiable by the custom of merchants. *Carlos v. Fancourt* (b), and *Hill v. Halford* (c), are authorities in point.

Campbell contra. An action may be maintained, as between these parties, upon this instrument, although it be not negotiable; for on the face of it it is stated to have been made for value received. The note itself contains a promise, and a consideration for that promise. An action, therefore, might have been maintained upon this instrument at common law. But, secondly, this is a valid note within the statute of *Anne*, as between the original parties, although, perhaps, it may not be nego-

(a) 2 *East*, 559.(b) 5 *Term Rep.* 482.(c) 2 *Bos. & Pull.* 413.

ciable.

ciable. It is not payable upon a contingency; for a note payable to two partners, which, in effect, is payable to one or to the other, is equally so. So, also, foreign bills of exchange, drawn in sets, may equally be said to be payable upon contingencies; for the direction is to pay this my first bill of exchange, the second and third not being paid; or the second, the first, and third not being paid; which is in effect directing the bill to be paid to the indorsee who may hold the first, or to the indorsee who may hold the second.

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ABBOTT C. J. I have no doubt that this instrument, in the form in which it is declared on, is not a promissory note within the statute of *Anne*; for if a note is made payable to one or other of two persons, it is payable to either of them, only on the contingency of its not having been paid to the other, and is not a good promissory note within the statute. I am also of opinion, that the second count cannot be supported; for admitting that an action might be maintained upon a note which appeared to be for value received, still the consideration should be stated in the declaration, in order that it may be seen if it is a consideration which will support an action; for there are many considerations which will not support an action, although there may be a subsequent promise. If, therefore, an action could be maintained in such a case, the plaintiff ought to declare upon the original consideration. For these reasons, I am of opinion that there should be judgment for the defendant.

BAYLEY J. I am of the same opinion. If there had been any community of interest stated between the
payees

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~~Bank~~
~~of~~
~~England~~

payees so as in any respect to identify *Damer* and *Blanchenhagen*, it is possible that an action might have been maintained on this note; but in the way in which the declaration has been framed, stating this as a note payable to one or the other, I am very clearly of opinion that it is not that description of note which the statute of *Anne* contemplated.

HOLROYD J. I am of the same opinion, that this note does not come within the description of notes contemplated by the statute of *Anne*. It is, in fact, a promise to pay to *A.*, if the maker does not pay to *B.* and *C.* It is therefore a conditional promise, and consequently not within the statute. And I am also of opinion that the second count cannot be supported; for at common law, a promissory note or bill of exchange was not considered as a specialty. Indeed Lord *Holt* continually insisted that no action could be brought on a promissory note, but that it must be brought for the original consideration. And the statute of *Anne* itself recites, "That the payee of a note cannot maintain an action by the custom of merchants, against the person who first made and signed the same." This, therefore, is a legislative declaration, that at common law no such action could be brought upon a promissory note; and therefore I am of opinion, upon both grounds, that there ought to be judgment for the defendant.

BEST J. concurred.

Judgment for defendant.

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HUNTER *against* FRY. (a)Wednesday,
April 28th.

COVENANT upon a charter-party of affreightment, made between the plaintiff and the defendant, the former being described as the owner of the ship *Hunter*, of the burden of 261 tons or thereabouts, then lying in the port of *London*. The owner covenanted that the master should load on board, freight free, goods not exceeding 100 tons, and sail to *Madeira*; and that upon her arrival there, the master should discharge, if required, and also receive on board, freight free, such other goods as the agents of the freighters at *Madeira* might think fit; and then should proceed to the *West Indies* direct off *Cape Henry*, or to some other port in *Hayti*; and when arrived at a port of delivery, and after having discharged the said outward cargo, should immediately receive on board from the agents or correspondents of the freighters, a full and complete cargo of coffee, in bags and casks; but not more of the latter than should be sufficient for a ground tier, and of logwood only such a quantity as should be sufficient for dunnage, but not exceeding in the whole what the said ship could reasonably stow and carry over and above her stores, tackle, apparel, furniture, and provisions; and then that the vessel should sail direct for the port of *London*, and there deliver her cargo. The freighter covenanted that his agents at *Hayti* should immediately reload on board of the vessel, in the customary manner, such full and complete cargo, within the time therein limited. The declaration then stated that the master

By a charter-party a ship was described to be of the burden of 261 tons, and the freighter covenanted to load a full and complete cargo: Held that the loading of goods equal in number of tons to the tonnage described in the charter-party, was not a performance of this covenant; but that the freighter was bound to put on board as much goods as the ship was capable of carrying with safety.

(a) This case was argued at *Serjeants' Inn*.

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 Hurren
 against
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proceeded from *London* to *Madeira*, and from *Madeira* to *Hayti*, and discharged his outward cargo, and gave notice to the defendant that he was ready to receive a full and complete cargo of coffee, in bags and casks, &c.; and that he did receive and take on board at *Hayti* aforesaid, from the agents of the defendant, 28 tons of coffee and 20 tons of logwood, being all the goods and merchandise which the agents of the defendant thought fit to load on board her, although the said ship could then and there have reasonably stowed, over and above her stores, tackle, &c., a much larger quantity, to wit, 500 tons of coffee other than and besides the coffee and logwood so laden on board the said ship at *Hayti* aforesaid, whereof the defendant's agents had notice. Breach, that the defendant or his agents did not nor would reload on board the said vessel, at *Hayti* aforesaid, a full and complete cargo to plaintiff's damage. Plea, that defendant did reload on board the said vessel, at *Hayti* aforesaid, a full and complete cargo, according to the charter-party, upon which issue was joined.

The cause was tried at the sittings after *Trinity* term, before *Abbott J.*, when the jury found a verdict for the plaintiff, with 918*l.* damages, subject to the opinion of the Court on the following case.

The charter-party stated in the declaration was executed on the day it bore date, by the defendant, who then resided in *London*. The said ship, with the goods on board shipped by defendant, proceeded from *London* to *Cape Henry*, in *Hayti*, which was fixed on as the only port for the delivery of her outward cargo, and the loading of her homeward cargo. The ship could reasonably have stowed and carried, as a homeward cargo from *Hayti* to *London*, over and above her stores, tackle, apparel, furniture, and provisions, 340 tons of coffee

coffee in bags, 40 tons of coffee in casks for a ground tier, and 20 tons of logwood for dunnage. The said ship being ready to take in her homeward cargo, the defendant's agents at *Cape Henry* supplied her with 288 tons of sugar, 26 tons of coffee, and 20 tons of logwood for dunnage, which were received on board by the master; but the agents did not supply any other homeward cargo, and the ship was obliged to proceed from *Hayti* on her voyage home, with only those goods on board, and without being, in point of fact, fully loaded. The defendant paid freight for the goods actually shipped and brought home. The sum of 918*l.* 18*s.*, awarded as damages, was the amount of the freight which would have been earned, had the vessel been loaded with a full and complete cargo of coffee in bags and casks, and logwood for dunnage as aforesaid, beyond the payments made by the defendant in respect of freight for the goods which were supplied.

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against
FAY.

Campbell was to have argued for the plaintiff; but the Court called on

F. Pollock contra. The ship-owner, by the charter-party, has represented the vessel to be of a given burden; and the freighter, who covenants to load a complete cargo, does so only on the faith that the representation of the owner, as to the capacity of the ship, is true. It would be hard, therefore, that the freighter should incur any liability in consequence of such a misrepresentation. In *Abbott on Shipping*, 287., it is stated that if an entire ship be hired, and the burden thereof be expressed in the charter-party, and the merchant covenant to pay a certain sum for every ton of goods which he shall load

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HUTTEN
against
FRY.

on board, the owners can only demand payment for the quantity of goods actually shipped.

ABBOTT C. J. I am of opinion, that the mention of a ship's burden in the description of a ship in the charter-party, in the manner it is here mentioned, is an immaterial circumstance; although it may be made material by the allegation of fraud or other matter. Here, the freighter has not covenanted to load a cargo equivalent to the burden mentioned in the charter-party: he has covenanted to load and put on board a full and complete cargo, and to pay so much per ton for every ton loaded on board. If the covenant had been to pay a gross sum for the voyage, the freighter (upon the arrival of the ship at the foreign port) might have insisted that the captain should take on board as much as the ship would safely contain; and the owner who had covenanted to take a full and complete cargo, would not be justified in saying, that he would take no more than the register-tonnage of the ship. It is, indeed, quite impossible that the burden of the ship (as described in the charter-party) should, in every case, be the measure of the precise number of tons which the ship is capable of carrying. That must depend upon the specific gravity of the particular goods; for a ship of given dimensions would be able to carry a larger number of tons, of a given species of goods, that were of a great specific gravity, than she would of another of a less specific gravity, and the freighter would therefore pay freight in proportion to the specific gravity of the goods. Upon the whole, I am of opinion, that the owner was bound to take on board such a number of tons of goods as the ship was capable of containing without injury; and, therefore,
that

that the plaintiff is entitled to have a verdict for 918*l.*, which is the difference between the sum actually paid for freight, and that which would have been payable if the shipper had loaded on board a full and complete cargo.

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BAYLEY J. This, in my opinion, is a very plain case. The ship, at the time of the execution of the charter-party, was lying in the port of *London*; the defendant, who resided there, had then an opportunity of examining the ship, and of forming his own judgment of her capacity to take a larger or a smaller cargo. It is true, that by the charter-party the owner has represented her burden to be about 261 tons; it is not, however, suggested that this representation was fraudulently made on his part. The covenant, on his part, is not merely that he will take on board 261 tons of goods, but that he will take a full and complete cargo, not exceeding what the ship can reasonably carry. And he therefore, would not have been justified in refusing to take goods beyond the amount of 261 tons, but was bound to take as much on board as the ship was capable of carrying with safety. The defendant then covenants that he will load on board a full and complete cargo; which must be taken to mean such a cargo as the ship could safely carry. The Defendant in this action has merely pleaded that he had put on board a full and complete cargo, and it has been proved that the ship would hold 400 tons, whereas he has only laden on board 260, which is 140 tons less than a full and complete cargo. For these reasons, I am of opinion, that the plaintiff is entitled to recover the difference between the freight of the goods

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actually.

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actually laden on board, and that which by the terms of his covenant he was bound to load on board,

HOLROYD J. I am also of opinion that the plaintiff is entitled to recover. The only issue is, whether the defendant has put on board this ship a full and complete cargo; which I take to mean as much as the ship would hold and safely carry. It has been argued, that the plaintiff is estopped from recovering freight for more than 261 tons of goods, by the description of the burden of the ship as given in the charter-party. I am, however, of opinion, that neither party is estopped by such matter of description, and I think that the defendant was bound to supply a cargo of 400 tons, if the ship would carry so much. There is no hardship in this case; for the defendant has not merely covenanted to put on board the amount of tonnage stated in the beginning of the charter-party, but he has covenanted to put on board a full and complete cargo. I am, therefore, of opinion, that the plaintiff is entitled to recover the difference between the sum which the ship has earned as the freight of the goods actually shipped on board, and that which she would have earned if a full and complete cargo had been laden on board.

BEST J. I am entirely of the same opinion. The stipulation in the charter-party is not that the owner should receive, and the freighter put on board, a cargo equivalent to the tonnage described in the charter-party; but that the one should receive a full and complete cargo, not exceeding what the ship was capable of receiving with safety, and that the other should put such a cargo on board. Now it is clear, that the
freighter

freighter would be entitled to recover damages against the owner, if the latter had refused to receive on board any thing less than what the ship could carry with safety; and it seems to me, that the defendant, who has covenanted to load a full and complete cargo, is equally liable in damages, for not having laden such a cargo as the ship could safely carry. I am, therefore, of opinion, that the plaintiff is entitled to recover the sum of 918*l*.

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HUNTER
against
FAY.

Judgment for Plaintiff.

ISAAC HODGSON and Another, Assignees of
ANN BYERS and WILLIAM BYERS, Bankrupts,
against BROWN and Another. (a)

Wednesday,
April 28th.

TROVER by the plaintiffs as assignees of *Ann Byers* and *William Byers*, to recover the ship *Langley*. The conversion by the defendants was alleged in the time of the assignees since the bankruptcy. The cause was tried before *Abbott J.* at the sittings after last *Trinity* term, when the jury found a verdict for the plaintiffs, subject to the opinion of this Court upon the following case :

In the month of *October*, 1816, the bankrupts were joint owners of the ship *Langley* of the port of *Newcastle-upon-Tyne*, and which ship was registered in their own names. The ship, on the 30th of *October*, was cleared out for a voyage to the *West Indies*, and on the 31st of that month, she left her moorings in the *Thames*, and proceeded on her voyage. Whilst she was at *Gravesend*, she was stopped by the defendants until

Where a ship registered at the port of *N.* was transferred by a deed of assignment to owners resident in *L.*, the ship being then in the port of *L.* : Held, that this transfer was not within 34 G. 3. c. 68. s. 15., but within s. 16. of that act; and that the transfer was valid, although no indorsement was made on the certificate of registry. Held also that the non-compliance with 7 and 8 W. 3. c. 22. s. 21. does not avoid the transfer.

(a) This case was argued at *Serjeants' Inn*.

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W. Byers,

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against
Brown.

W. Byers, who acted as captain, executed a deed of assignment of the ship in their favour; to whom, as ship's brokers, the owners were then indebted in the sum of 2000*l.*, or thereabouts. The defendants then had the ship's register in their hands, and when the assignment was executed, delivered it back to *W. Byers* as master of the ship. *W. Byers* sailed from *Portsmouth* with the ship for the *West Indies* on the 18th of *November* following. The deed was duly executed by the other owner, *Ann Byers*, on the 13th of *November* in the same year. On the 18th day of the same month of *November*, a copy of the deed was delivered at the custom-house at *Newcastle-upon-Tyne*, and an entry thereof was indorsed on the oath or affidavit on which the said ship had been there registered. On the 22d of *July*, 1817, *W. Byers* returned with the *Langley* from the *West Indies* to the river *Thames*. The defendants asked him for the ship's papers, to get her reported. He gave them to the defendants, including the ship's register, to get her reported, and they got her reported accordingly in the same manner as they were accustomed to report all their own ships. On the same day the defendants gave *W. Byers* the following notice: —

“ By virtue of the proviso for that purpose, contained in a certain indenture of assignment, bearing date the 31st day of *October*, 1816, from you to us, of the ship *Langley*, we hereby give you notice, that at the expiration of two months from the date hereof, we shall proceed to sell and dispose of the said ship for the purposes specified in the indenture of assignment. Dated this 23d day of *July*, 1817. *Richard Brown, Robert Brown*. — To Mrs. *Ann Byers* and Mr. *William Byers*.”

No part of the debt to them had then been paid. On the same day a notice to the same effect was sent by the

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the post, addressed to Mrs. *Byers* at *South Shields*, her usual place of residence. The defendants immediately took possession of the ship, and have continued in such possession ever since, and upon a demand for that purpose, refused to deliver up the same to the said plaintiffs. On the 25th day of *July*, 1817, an indorsement of the transfer, to the defendants above stated, was made at the custom-house at *Newcastle* upon the above ship's register by *John Haig*, the clerk to the defendants, under a power contained in the deed of the 31st *October*, 1816. A commission of bankrupt issued against *Ann Byers* and *William Byers* on the 9th day of *August*, 1817; and an assignment of their estate and effects to the said Plaintiffs was, on the 23d day of *August*, 1817, executed by the major part of the commissioners named in the commission.

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against
BROWN.

Puller, for the plaintiffs. The ship having been sold to an owner resident in *London*, that became the port to which she belonged, and the transfer having been made while she was yet in the *Thames*, it was not a case within the 16th section of the 34 G. 3. c. 68., and therefore, under that act, there ought to have been an indorsement on the certificate in the manner pointed out in the 15th section. Assuming, however, that *Newcastle* was the port to which she belonged, then, under stat. of the 7 & 8 W. 3. c. 22. s. 21., she ought, upon the transfer of the property to another port, to have been registered de novo, and the requisites, therefore, of neither act having been complied with, the property did not pass by the assignment. And he referred to the opinions delivered by *Mansfield C. J.* and *Heath J.* in *Hubbard v. Johnstone*. (a)

(a) 3 Taunt. 177.

Campbell,

1819.

Campbell, contra, was stopped by the Court.

Hodson
against
Brewer.

ABBOTT C. J. I am clearly of opinion, that, under the circumstances, all has been done respecting this ship which the different acts of parliament require. Assuming that this was a case within the statute of *William*, still this would not have been a void conveyance; for the 34 G. 3. is the first statute which renders void the conveyances of ships, if made contrary to the provisions of that act. The 15th section of that statute applies to the alteration of property in the port to which the vessel belongs; here *Newcastle* was the ship's port, and the alteration of property took place in *London*. This case, therefore, does not fall within that section; and the 16th section, which applies to an alteration of property in vessels absent from the port to which they belong, directs that the indorsement shall be made within ten days after the return of the ship to such port. Now, here, the ship never did return to *Newcastle*, and consequently no opportunity has occurred of complying with the requisites of that act of parliament. I am, therefore, of opinion, that as no act of parliament has rendered this conveyance null and void, that the property thereby passed, and consequently that there must be judgment for the defendants.

Judgment for Defendants.

1819.

PEPPIN and Others *against* COOPER. (a)Wednesday,
April 28th.

DEBT on bond, dated 18th *Decem̄ber*, 1812, in the penalty of 1000*l*. Defendant craved oyer of the bond, which appeared to be a bond by *Henry Warren* and *Henry Cooper* to the plaintiffs therein described, as three of the commissioners for putting in execution the several acts of parliament relating to the land-tax, &c., and the condition of the bond, after reciting that *Henry Warren* and *G. Pepper* had been duly appointed *collectors* of the rates and assessments upon the parish of *St. Ann, Kew*, in the county of *Surry*, and that a duplicate of such assessments, together with a warrant appointing the said *Henry Warren* and *G. Pepper* to collect the same, had been delivered to them, was, that if the said *Henry Warren* should from time to time, *and at all times thereafter*, well and faithfully collect, as well all and every the sum and sums of money in the said assessments respectively charged and specified, as also all and every such other rates, taxes, charges, duties, and assessments which then were, or should or might, *at any time thereafter*, be rated, taxed, charged, assessed, or imposed upon the said parish, or the inhabitants thereof, and for the levying or collecting of which any duplicates or warrants should be delivered by the commissioners to *Henry Warren*, and should well and truly pay the same to the receiver-general of the taxes, rates, and duties, for the time being, within such time and in such manner as the said acts or any of them directed, and

A bond, with one surety only, taken by commissioners of taxes under the 43 G. 3. c. 99. s. 13., is not, therefore, void.

The office of collector under that act of parliament is an annual office; and, therefore, when a bond, after reciting the appointment of *H. W.* to be collector under the act, was conditioned for the due collection by *H. W.* of the rates and duties at all times thereafter, it was held that the due collection of the rates for one year was a compliance with the condition of the bond.

And although it appeared from the condition of the bond that *H. W.* and *G. P.* were both appointed collectors, it was held that such bond, being for the due collection by *H. W.* only, might be put in suit against the surety without first selling the goods of *G. P.*

(a) This case was argued at *Serjeants' Inn*.

also

1819.

PEPPER
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also should, when thereunto required, give and render unto the commissioners for putting the acts into execution in the county of *Surrey*, a true account of all such sums of money as he the said *Henry Warren* should have collected and received by virtue of any such assessments, and should faithfully pay and deliver the same, together with all such assessments which should be then in his hands, unto the commissioners, then the said obligation to be void, otherwise to remain in full force. The Defendant then pleaded, first, *non est factum*; secondly, that the writing obligatory was not nor is a security taken in pursuance of the statute in that case made and provided, by a joint and several bond, with *two sureties* at the least, and with a condition to the effect in the said statute mentioned; thirdly, performance of the condition by *Warren* generally; fourthly, performance of the said condition, by *Warren*, for the space of one year from the time of his being so returned, nominated, and appointed as collector. The fifth plea stated, that *Warren* was so returned, nominated, and appointed such collector, as in the condition mentioned, for a certain time, to wit, for the space of one year, commencing on the 22d *August*, 1812, and then pleaded performance of the condition for that year. The sixth plea stated, that before and at the time of the commencement of the action, there were goods and chattels of *Henry Warren*, which had not been sold by virtue of the several directions and powers given to the respective commissioners, by the statute in that case made and provided: the seventh plea was like the sixth, except that it applied to the goods of *George Pepper*.

The plaintiffs joined issue upon the first plea, and demurred to the second; and as to the third plea, the
plaintiffs

plaintiffs replied that *Warren* did not perform the condition of the bond, and assigned breaches in the replication. To the fourth and fifth plea there was a general demurrer. As to the sixth plea, plaintiff's replied that there were not any goods and chattels of *Warren's* sufficient to satisfy the deficiency for which the bond had been put in suit, and upon this issue was joined. To the seventh plea there was a general demurrer. The defendant joined in demurrer to the second, fourth, fifth, and seventh pleas.

Campbell, in support of the demurrer. The second plea is bad, because the act of the 43 G. 3. c. 99. is merely directory, and not imperative on the commissioners to take a bond with two sureties. The 13th section enacts, "That such persons as shall be presented to the commissioners, as before directed, to be collectors shall, if required so to do, give good and sufficient security to any two or more of such commissioners, equal to the amount of the whole duty to be collected in each district, for their duly paying the money that comes to their hands, &c., which security the commissioners are hereby required to take, by a joint and several bond, with two sureties, at the least; and on failure of the persons so first named to be collectors giving such security, if required, the commissioners are authorised to appoint any other person who can give such security residing within the district; and if no person can be found within such district willing or able to give such security, the persons who are first presented to the commissioners, as before directed, shall be collectors." As far as this section of the act goes, it is entirely in the discretion of the commissioners whether they

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they will take any bond at all; and there is no other clause in the act which expressly renders void such bonds, if not taken in the form prescribed. Indeed, if the construction contended for were to prevail, the bond would be void, if not taken to the amount of the whole duty, for that is part of the directions of the act. Besides, this absurd consequence, too, would follow, that the commissioners would be bound to reject a person who could find one surety, although they might appoint a collector who could find none; for by the latter part of the section, they are authorised, if no person can be found in the district capable of giving the required security, to appoint the original collectors without any security at all. The only instance where the act makes it imperative on the commissioners to take security at all from the collectors, is where it is required by the inhabitants of the district, and that is expressly provided for by the 14th section; but even in that case, the form of the security is not prescribed. The fourth plea is bad; because it does not allege the office of collector to be an annual office, nor that the collector was appointed for a year, nor that the bond was given as security for the due performance of the office for a year. The fifth plea, too, contains no allegation that this was an annual office at the time the bond was executed, nor that the appointment for the one year mentioned in that plea, was the appointment in respect of which the bond was given; nor is there any allegation that the bond was given as a security for the performance of the duties of the office by *Warren*, during the year. In all the cases which have been decided upon this subject, it has either been alleged in pleading, or admitted upon the record, that the office of collector

was an annual office. In the warden of *St. Saviour's, Southwark v. Bostock* (a), the replication admitted the office to be an annual office. In the *Liverpool Water Works v. Atkinson* (b), the condition of the bond recited that the defendant had agreed to collect the revenues for twelve months. In *Hassell v. Long* (c), the plea stated that the office was an annual office, and that the collector held the office for the then current year, and that the bond was made to secure the payment of money collected by him during that current year. And *Curling v. Chalklend* (d) is a strong authority in favour of the plaintiff. The bond in that case was founded upon a similar act of parliament; and the Court held that the office was not necessarily an annual office, and that the obligation was to be taken for so long as the office might continue. The seventh plea is clearly bad; because the collector, whose goods are to be sold before proceedings be had upon the bond against the surety, is the collector who has made default. The goods of the collector cannot be seized until he had made default; and non constat that *Pepper* has made default.

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Chitty contra. The act of parliament has imposed a duty on these commissioners which they must strictly perform, in the manner prescribed by the act. They are authorised by the 13th section to take a bond with two sureties, at the least. They have not pursued the powers so given to them, and therefore the instrument is void. [He was then proceeding to support the fifth plea, but the Court intimated an opinion that the office

(a) 2 Bos. & Pull. N. R. 175.

(b) 6 East, 507.

(c) 2 Maule & Selw. 363.

(d) 3 Maule & Selw. 502.

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was an annual office, and directed him to proceed to the other point.] The act expressly directs, that the bond shall not be put in suit while the lands and goods of the collector or collectors are unsold. Now, here it appears that *Pepper* is a collector under the act, and consequently before the sale of his goods, as well as those of *Warren*, the bond cannot be put in suit.

ABBOTT C. J. Upon a review of the different enactments of this statute, I am of opinion that this bond, although taken with one surety only, is good and valid. The 13th section of the act is not imperative on, but only directory to, the commissioners. It leaves it as a matter entirely in their discretion whether they will take any bond at all; and if the collectors originally named by the assessors are unable to give the security required, the commissioners are authorised to appoint other persons who are able to give such security; and if none such can be found within the district, the collectors originally nominated (although unable to give security) are to be appointed. There is one case, therefore, where the act is imperative on the commissioners to appoint collectors unable to give the required security. The 14th section provides, that if the inhabitants require security to be taken, and name persons willing to give security, the commissioners shall appoint such persons to be collectors; that section of the act, therefore, contemplates the possibility of an appointment of collectors by the commissioners without any security at all. This does not appear, from any thing alleged in the pleadings, to be a case falling within that section of the act. Inasmuch, therefore, as the act does not expressly avoid a bond taken with one surety, and as the legislature

not only authorises, but compels the commissioners to appoint collectors who cannot give security, I am of opinion that this bond is a good bond; and, therefore, that upon the second plea, (which is founded upon the assumption that this is a void bond,) there should be judgment for the plaintiff. Upon the second point, I am of opinion, that the condition of the bond is satisfied by the faithful collection of rates and duties for the space of one year. It is true, that the words, "at all times hereafter," in the condition of the bond, would, taken by themselves, extend the liability of the surety beyond that period. But these words must be construed with reference to the recital, and to the nature of the appointment there mentioned; and the recital is, that *Warren*, together with *Pepper*, had been appointed collectors under the said act of parliament. Now, the nature and duration of that office must be learnt from the act of parliament itself; for if the statute make it an annual office, it is unnecessary to state that fact, either in the bond or in pleading. Now, by the act, the commissioners are to appoint to this office two persons annually returned to them by the assessors: the office of assessor, as well as that of clerk to the commissioners, continuing only for one year. The office, therefore, of collector, who is to be annually returned to the commissioners by officers annually appointed by them, must itself be annual. I think, therefore, that it was the intention of the parties to this bond that the obligation should only be co-extensive with the duties to be performed, and that the fifth plea is sufficient. As to the last point, I am clearly of opinion that this bond might be put in suit without selling the goods of *Pepper*, who, in this case, was a

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mere surety; for, although it appears upon the face of the bond that he is a collector also, still he is not the collector contemplated by the act of parliament, whose lands and goods must be sold before proceedings are had upon the bond against the surety. I am therefore of opinion that there must be judgment for the plaintiff on the second and the seventh pleas, and for the defendant on the fifth plea.

BAYLEY J. I am of the same opinion. The validity of the second plea depends on the question, whether it be imperative on the commissioners to take a bond with two sureties, and referring to the provisions of the act, which direct security to be taken, it seems to me that it is not, in every case, requisite that a bond should be taken with two sureties. By the ninth section, the assessors are to return the names of two persons to be appointed collectors by the commissioners. The thirteenth section then enacts, "that such persons shall, if required, give security which the commissioners are authorised to take in a bond with two sureties at the least, and if the parties so nominated by the assessors be unable to give the required security, the commissioners may appoint others who can give security; but if no person can be found in the district, who can give such security, then those originally nominated by the assessors, and who could not give the required security, may be appointed." Here, therefore, is a case where the commissioners may appoint collectors who cannot give the required security, and can it be contended that if the party nominated in such a case could not procure two sureties, that the

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commissioners would not be justified in taking a bond with one, and that such a bond would be void? The fourteenth section then provides that the inhabitants of the parish may require security to be taken, and may name persons willing to give such security; and perhaps such security, if taken by the commissioners, should be taken in the form prescribed in the thirteenth section. If, therefore, the persons originally returned by the assessors are required in the first instance to give security, or if in default thereof the commissioners or inhabitants of the parish appoint or name others, it may be contended that a bond must be taken with two sureties. But there is nothing on these pleadings to shew that the appointment in question came within any of these classes; and if not, the act does not absolutely avoid a bond taken with one surety. Upon the second point, I am quite clear upon this act of parliament that the office of collector is an annual office, and that the bond being taken under the act, the liability can only be co-extensive with the duty required to be performed, I do not mean to say that a bond for a longer period would be absolutely void; but merely that there ought to be very strong words to shew that clearly to be the intention. By the act, the commissioners are to meet yearly to appoint assessors *for a year*, and the assessors are to nominate persons to be collectors. Now, as the assessors themselves are annual officers, and are annually to return the names of persons to be collectors, the legislature must have intended the duty of collector to continue only for one year. I therefore think that the fifth plea is a good plea, and that being so, it is unnecessary to pronounce any judgment on the seventh

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plea; but I entirely agree with my Lord Chief Justice that that plea cannot be supported.

HOLROYD J. I am also of opinion, that this bond is not void for want of two sureties. The thirteenth section of the act gives to the commissioners an authority to take one with two sureties, but it is not compulsory on them so to do, except in the case contemplated by the fourteenth section. I also agree with my Lord and my Brother *Bayley*, that this is an annual office, and that the fact of the collector having faithfully performed his duty for one year, is a sufficient compliance with the condition of the bond. Upon the third point, I also think that this bond may be put in suit against the surety, although it may happen that another person has been jointly appointed a collector, without first selling the lands and goods of that person; for the collector, contemplated by the act, whose goods are to be sold previously to the bond being put in suit, is the collector who has made default.

BEST J. I agree with the rest of the Court, that this is a good and valid bond. The act does not, in express terms, make void a bond taken with one surety only. In the case of a bail-bond, it is the duty of the sheriff to take sufficient sureties, yet the bond is not void if he take only one; and in *Austen v. Haward* (a), the Court of Common Pleas held a replevin-bond taken with one surety, not to be void, although it was the duty of the sheriff to take two. The principle that appears to have governed the decision in that case applies to the present. With respect

(a) 2 Mar. 352.

to the second question, I entirely agree with the rest of the Court, that this is an annual office: the case of *Hassell v. Long* is precisely in point.

Judgment for the Defendant on the fifth plea, and for the Plaintiff on the second and the seventh.

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DOE, on the Demise of JOHN BALDWIN and ELIZABETH his Wife, *against* THOMAS RAWDING and ELIZABETH his Wife. (a)

Wednesday,
April 28th.

EJECTMENT tried at the last *Midsummer* assizes for the county of *Lincoln*, when a verdict was entered for the lessors of the plaintiff, subject to the opinion of the Court, on the following case:

William Wells, of *Spalding*, died in *January*, 1808, leaving his wife, *Elizabeth*, since married to *Thomas Rawding*, the defendant, and an only daughter *Mary Wells*, and by will devised his property as follows: "I give and devise unto my affectionate wife, *Elizabeth Wells*, one undivided moiety or equal half part of all and every my messuages, cottages, lands, tenements, and hereditaments whatsoever and wheresoever, with their and every of their appurtenances, to hold the same unto my said wife and her assigns, for and during the term of her natural life, charged and chargeable, nevertheless, to and with a certain weekly payment unto my mother *Sarah Wells*, of *Helpston*, widow, for and during the term of her natural life; and from and immediately after the decease of my said wife, I give and devise the same, subject as aforesaid, unto

One devised to his daughter, then under age, an estate in fee, and if she died under the age of 21 years, unmarried and without leaving lawful issue, then to his wife in fee. The daughter married and died under the age of 21 years, without issue; but left her husband surviving her: Held that the devise over did not take effect, as by the words of the will it was made to depend on the happening of the three events, dying under 21, dying under that age unmarried, and dying under that age without issue.

(a). This case was argued at *Serjeants' Inn*.

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my daughter, *Mary Wells*, and all and every other the child and children which I shall have at the time of my decease, or which shall be born in due time afterwards, and to her or their heirs and assigns for ever; also I give and devise unto my said daughter, *Mary Wells*, and such other child or children which I shall leave, or which shall be born as aforesaid, the other undivided moiety or equal half-part of all and every my said messuages, cottages, lands, tenements, and hereditaments whatsoever and wheresoever, with their and every of their rights, members, and appurtenances: to hold the same unto my said daughter *Mary Wells*, and such other child or children which I shall leave, or which shall be born as aforesaid, and to her or their heirs and assigns for ever, subject and chargeable, nevertheless, to and with the same weekly payment unto my said mother, *Sarah Wells*, during the term of her natural life; but in case my said daughter, *Mary Wells*, and such other children as aforesaid, shall die under the age of twenty-one years, unmarried, and without lawful issue, then and in such case I give and devise the entirety of all and every my said messuages, cottages, lands, tenements, and hereditaments, from and after the decease of my said daughter *Mary*, and such other children as aforesaid, unto my said wife, *Elizabeth Wells*, her heirs and assigns for ever; also I give and bequeath unto my said wife and daughter, *Mary Wells*, all and singular my household goods and furniture, during their joint natural lives; and after the decease of my said wife, I give the same unto my said daughter, for her own use: and all the rest, residue, and remainder of my goods, chattels, personal estate, and effects whatsoever and wheresoever, I give to cer-
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tain trustees, in trust, to sell, and reasonably to apply the net monies arising therefrom in paying my simple contract debts; and then to pay off the mortgage affecting my real estate: but in case there shall be more than sufficient to pay off and discharge the same, then, in trust, to pay such residue unto my said wife, to and for her own use; and I do hereby appoint my said wife, *Elizabeth Wells*, sole executrix of this my will." On the death of the testator, *Mary Wells* became seised of the moiety bequeathed to her, and in *February*, 1817, married *W. Goodwin*, and died under the age of twenty-one years, and without issue, in the following *September*: *Elizabeth Baldwin* is heir at law of *Mary Goodwin*.

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Marriott, for the plaintiff. The question here turns upon the construction of the devise over; the words of which are, "that in case his daughter die under twenty-one, unmarried, and without issue." The daughter has died under twenty-one, and without issue, but she was a married woman, and has left a husband surviving her. By the terms of the will, the devise over is to take effect upon the happening of three things; the death of the daughter under twenty-one, her death under twenty-one without being married, and her death under that age without issue. Two only of these events have happened, and therefore the estate does not pass by the devise over. This very point was decided by this Court, in the case of *Doe v. Cooke* (a), where all the former authorities were considered. There the words of the devise over were, "in case *Thomas Cooke* shall die an infant, unmarried,

(a) 7 East, 269.

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and without issue." There *T. Cooke* attained the age of twenty-one years and married, but died without having issue; and it was held, that the devise over depended upon one contingency, viz. *T. Cooke's* dying *an infant*, attended with two qualifications, viz. his dying without leaving a wife surviving him, or dying childless; and that the devise over could only take effect in case *T. Cooke* died in his minority, leaving neither wife nor child; that it failed, *T. Cooke* having attained twenty-one, and married before his death; and *Doe v. Jessop (a)*, is an authority in support of the same principle. There the devise was to *A.* in fee, and if he died under twenty-one and without issue, it was to go over; *A.* attained twenty-one, but died without issue. It was held, that the devise over did not take effect, as it was made to depend upon the happening of both events; first, *A.'s* dying under twenty-one; secondly, his dying without issue.

Sugden, contra. This will must be construed so as to effectuate the general intention of the testator, to be collected from the will itself. Now the testator's daughter and her issue appear to have been the first objects of his care. He devises to her a fee; and if she attains twenty-one, she has the power of disposing of that fee; if she dies under twenty-one and leaves issue, her issue are to take. The wife seems to have been the next object of the testator's care; and the intention appears manifest that she should be preferred to his collateral relations. Yet, construing the devise over, as contended for on the part of the plaintiff, the collateral relations will be preferred to the wife. It could not

(a) 12 *East*, 289.

have been the intention of the testator that the mere circumstance of her leaving a husband surviving her, should have the effect of continuing the fee in the daughter, for that would confer no benefit whatever on her and her issue, for whom it was his object in the first instance to provide. [*Bayley J.* The daughter might be materially benefited; for in such a case she might, by obtaining a writ of privy seal, be enabled to settle her estate upon her husband, and thus advance herself in marriage.] It cannot be supposed that this testator could have contemplated such a mode of providing for his daughter's husband. It is not practised at the present day, and it may be even doubtful whether the application would succeed. It is impossible, therefore, to construe this will with reference to such an obsolete practice. The difficulty in this case arises from the word "unmarried," in the devise over. If the words had been only "*under age, and without lawful issue,*" there would have been no question whatever. The word *unmarried*, however, in point of legal construction, means "never having been married at all," and that meaning is fully expressed by the testator, by the words "without lawful issue," because there could be no lawful issue without his daughter having been married at all. The word *unmarried*, therefore, here, is a useless, nugatory word, and may be rejected; or, without rejecting that word, but taking it in its legal sense, and substituting the word *or* for *and*, the clause may be read thus. If my daughter die under twenty-one, without having been married at all, *or* having been married without leaving issue. *Goshawke v. Chiggel (a)*, and *Framlingham v. Brand (b)*, are autho-

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(a) *Cro. Car.* 154.(b) 3 *Atk.* 390.

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rities to shew, that the legal sense of the word unmarried is never having been married at all; and those authorities are confirmed by the two modern cases of *Maberty v. Strode* (a), and *Bell v. Phyn*. (b) In the former case the words of the devise over were, "in case my said son should die unmarried, and without issue." The son married, but died without issue; and Lord *Alvanley*, then Master of the Rolls, said, that the word unmarried meant never having been married at all, and that the word "and" should be read "or," in order to effectuate the intention of the testator; and he held that the estate passed by the devise over. That case, therefore, is precisely in point with the present. *Bell v. Phyn*, however, is equally strong: the words there were, "without being married, and having children." Sir *William Grant* said, that the expression *without being married*, was to be construed in a will without *ever* having been married; and that the word *and* should be construed *or*, to give effect to the words of the will; and then he says, that the contingency of dying unmarried, and without children, cannot properly be said to be any thing more than the latter event, as, legally speaking, there can be no children without a marriage. *Brownsword v. Edwards* (c), and *Milliner v. Burbidge* (d), in K. B., also are authorities to shew, that to effectuate the intention of the testator the word *and* may be read *or*. *Doe v. Cooke* was the case of a will of personal property, and the husband there would take the personal property of his wife under the statute of distributions: here the husband could derive no

(a) 3 Ves. jun. 450.

(b) 7 Ves. jun. 458.

(c) 2 Ves. 247.

(d) Not yet reported.

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benefit from the will, except in the event of the birth of a child, in which case he would have been tenant by the courtesy, *Buckworth v. Thirkell*. (a) And besides, *Maberley v. Strode*, and *Bell v. Phyn*, which are authorities precisely in point with this case, were not adverted to in *Doe v. Cooke*.

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ABBOTT C.J. By the terms of this will, the testator has given to his daughter an estate in fee. The whole estate is given to her, unless there should be other children at the time of his decease, or born in due time afterwards, and in that event they are to participate. Then comes the limitation over, upon which the question in this case turns: the words are, "in case my said daughter *Mary Wells*, and such other children as aforesaid, shall die under the age of twenty-one years, unmarried, and without lawful issue, then, in that case, I give and devise the entirety of my said lands, &c., unto my wife." The testator, in fact, had no other issue than the daughter mentioned in his will: that daughter died under the age of twenty-one years, without leaving lawful issue; but she did not die *unmarried*, and I am of opinion that the fee remained in her at the time of her death, and passes to her heir at law. According to the plain and obvious meaning of the words, "under the age of twenty-one years, unmarried, and without lawful issue," the testator provides for a single event consisting of three parts, namely, dying during her minority, dying unmarried, and dying without children: that is the plain and obvious meaning of the words. It has been argued, however, that it could not

(a) 5 Bos. & Pull. 652.

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have been the intention of the testator that the fee should remain in his daughter, if she died under twenty-one, and without issue; because, in that case, the estate would confer no benefit upon her. An instance has, however, been put by my Brother *Bayley*, in which she would derive a benefit from the fee remaining in her, by enabling her to settle the estate upon her husband. It is true, that a writ of privy seal is not frequently resorted to at the present day; but it still is a mode by which the daughter might have been enabled to make a provision for her husband. In order, however, to put the construction upon the will which the defendant has contended for, the word *unmarried* must be wholly rejected. I cannot, however, reject from a will any word, unless I see that the meaning to be given to that word is contrary to some intention plainly expressed in other parts of the will. Now, I cannot collect from any thing in this will, that it is contrary to the intention of the testator that the fee should remain in the daughter if she married; and that being so, the word *unmarried*, in my judgment, cannot be rejected. I am therefore of opinion, that the event upon which the devise over was to take effect, namely, the death of *Mary Wells*, unmarried, under the age of twenty-one, has not happened; and therefore that the fee passes to her heir at law, and consequently that there must be judgment for the plaintiff.

BAYLEY J. I am of the same opinion. The limitation over is to take effect upon *Mary Wells* dying under twenty-one, unmarried, and without leaving lawful issue: if she dies under twenty-one, unmarried, and without lawful issue, the defendant is entitled to succeed,

ceed, otherwise the lessor of the plaintiff is entitled to recover. *Mary Wells* has, in fact, died under twenty-one, and without leaving lawful issue; but she has not died unmarried. The argument on the part of the defendant is, that the word *unmarried* is a useless nugatory word, and ought to be struck out of the will entirely. The Court cannot, however, reject any word, if an adequate sense can be given to it; and I am of opinion, that an adequate sense may be given to the word *unmarried* in this will. It has been said that the testator could only use the word *unmarried* in one sense, viz. as expressive of the idea of *Mary Wells* never having been married at all; and that then, as far as the intention of the testator is concerned, that event is sufficiently provided for by the words "without lawful issue," because she could have no lawful issue without having been married. I apprehend, however, that the word *unmarried* may either mean never having been married at all, or without having at the time husband or wife. It is used in the latter sense by the legislature, in the statute of 3 and 4 *Wm. & Mary*, c. 11., which enacts, that if any unmarried person, not having a child, shall be lawfully hired into any parish for one year, such service shall give a settlement. A widower has been held to be an unmarried man, within the meaning of this statute. In this sense, too, was this word considered by the Court of K. B., in the case of *Doe v. Cooke*, where the words of the devise over were precisely the same as the present; and I am very desirous to act upon that authority here, as it will enable the Court to give effect to every word in the will. That was indeed the case of a will of personal property, and the husband, under the statute of distribution,

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bution, would be entitled to the personal property of his wife; and it is said that that makes a material distinction between the two cases, for here the husband could derive no benefit if he survived the wife. That, however, in strictness, is not correct; for the property may have been made beneficial to the husband in the event of his surviving his wife, either by an application to the legislature or by a writ of privy seal. The latter mode, at the present day, is rarely resorted to, being superseded by the modern practice of applying for an act of parliament. (a) It is still, however, part of the law of the land; and the course of proceeding was for the crown, upon the petition of the infant and her guardian, to grant letters, under the privy seal, to the Judges of the Court of Common Pleas, directing them to permit the infant to levy a fine or suffer a recovery. It is, then, in the discretion of the Court to permit the thing to be done, or not, according to the circumstances. The husband, therefore, in this case, might have derived a benefit if he had survived his wife; and *Mary Wells*, the daughter, would be materially benefited by being enabled to make a provision for her husband before marriage. It may, therefore, have been the intention of the testator so to have benefited the daughter, by preventing the devise over from taking effect in the event of her marrying before twenty-one; and it must be recollected that we are bound to construe this will as if it was the will of the ablest lawyer in Westminster Hall. It appears to me, therefore, that this may have been the intention of the testator: — If my daughter dies under twenty-one, but leaves a child, then the estate shall go

(a) See 10 Rep. 43. a. Cro. Eliz. 471. 1 Ld. Raym. 113.; and Sir John St. Alban's case, Salk. 567., and 5 Cruise's Dig. tit. Recovery, 431.

to the child; if she dies under twenty-one, without a child, but leaves a husband, it shall go in such a way as she may settle it for the benefit of that husband: thus giving her a power which would enable her to advance herself in marriage, and confer upon her a material benefit. But if she died under twenty-one, leaving no issue, and without leaving a husband, for whom it might be the intention of the testator to enable her to provide, in those three events the widow was to take; but she is to take it only subject to these three events. That is the construction put upon words precisely similar to the present, by this Court, in the case of *Doe v. Cooke*; and I think that that construction ought to prevail here. I am, therefore, of opinion, that the devise over does not take effect, because the event upon which it was made to depend has not occurred, and therefore, consequently, that the lessor of the plaintiff is entitled to recover.

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against
Rawlins.

HOLROYD J. I am also of the same opinion. If the words of this will are taken as they stand, without any being rejected or changed, it is quite clear that the event has not happened on which the estate was to go over; because the daughter having married, and left her husband surviving her, did not die unmarried. Now, I take it to be a rule of law, that we are not to reject or change any words in a will, unless it be to carry into effect the intention of the testator apparent from the rest of the will. Now, here there does not appear to be any thing in the will to make it necessary to change any words, or to alter the word *and* into *or*. It has been argued that the word *unmarried* is to be taken in a restrained sense, as meaning "never having
been

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against
Rawding.

been married at all." The word, however, must be construed in such a sense as will make it operative, and not in such a sense as will make it nugatory; for I take it to be clear, that if a word in a will is capable of two senses, one of which makes it operative, and the other *inoperative*, such construction is to be given to it as will make it operative, unless there be something on the face of the will clearly shewing that it was the intention of the testator that it should be taken in the *inoperative* sense. Here, however, the argument in this case is, that the word is to be taken in that sense in which it is to have no effect at all; and that the word *and* is to be changed into *or*. If, however, the word *unmarried* be taken to mean, without leaving a husband, the word *unmarried* is not rendered *inoperative* by the following words, "and without issue;" and, in that case, it is wholly unnecessary to alter the word *and* into *or*; and there is nothing on the face of the will to shew that it was the intention of the testator to use it in the other sense. I think, also, that there is great weight in what has been urged with respect to the daughter's applying for an act of parliament, in order to enable her to make a provision and settlement on her husband, and thus give her a better marriage. It has been said, that the testator cannot be presumed to have been aware that such an application might be made to parliament. To this it may be answered, that if he did know it, that might have been a reason for his inserting the word in the will. If he was ignorant of it, and still chose to put it in the will, I think we have no right to reject it, there being nothing else in the will to shew that it was put in by mistake, or that it will have an effect not intended by the testator.

BEST J.

BEST J. I am also clearly of the same opinion. The testator has, by this will, given to his daughter an estate in fee; and unless we see clearly on the face of the will, an intention expressed that the estate is to be interrupted in its progress, the heir at law is entitled to our judgment. The words of the devise over are these, "in case my daughter *Mary Wells* shall die under the age of twenty-one years, unmarried, and without lawful issue." Now, what is to happen before the estate is to be taken out of the heir at law, and given to the wife? Why, the daughter is to die under twenty-one, she is to die unmarried, and she is to die without lawful issue: all these three things are to happen before the devise over is to take effect. If only one or two of them happen, the estate is to go to the heir at law; but if all the three happen, then the estate is to go to the wife. Now, all the three have not happened; for though she died under twenty-one, she died a married woman; and that being so, the estate must go to the heir at law, and consequently the lessor of the plaintiff is entitled to recover.

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DOX
against
RAWDING.

Judgment for Plaintiff.

ROE, on the Demise of COSH, *against* LOVE-
LESS. (a)

Wednesday,
April 28th.

EJECTMENT for copyhold premises. At the trial at the last Summer assizes for the county of *Hants*, before *Park J.*, the plaintiff, in support of his case,

Where the lord of a manor, by copy of court-roll, granted *A.* the reversion of certain premises then in his te-

nure, to have and to hold to *B.* for his life, immediately after the death of *A.*: Held that *B.* might, on the death of *A.*, maintain an ejectment, although he had never been admitted, he having acquired a perfect legal title by the grant, without admittance.

(a) This case was argued at *Serjeants' Inn*.

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 Rex
 against
 Lovell.

produced a copy of the court-rolls of the manor, dated 18th *June*, 1789, by which it appeared, that *Richard Kiddle*, and *Sarah* his wife, took of the lord the reversion or remainder of and in the premises in question, therein described as being then in the tenure of them the said *Richard Kiddle*, and *Sarah Kiddle* his wife; to have and to hold to *James Cosh*, aged nineteen years, for the term of his natural life, at the will of the lord, according to the custom of the said manor, immediately after the death, surrender, or forfeiture of the said *Richard Kiddle*, and *Sarah* his wife, by yearly rent, &c.; and the said *Richard Kiddle* and *Sarah Kiddle* gave to the lord for a fine 37*l.* 12*s.*; and it is granted in form aforesaid. The plaintiff then proved the death of *Richard Kiddle* and his wife. It was objected, on the part of the defendant, that the admittance of *Cosh* ought to have been proved to give him the legal title. The learned Judge directed the jury to find for the plaintiff, reserving liberty to the defendant to move to enter a nonsuit; and a rule nisi having been obtained by *Moore* for that purpose in *Michaelmas* term,

Casberd now shewed cause. The lessor of the plaintiff takes not by descent or surrender, but by grant from the lord: he is named in the habendum, and takes a separate independent interest; an admittance may therefore be implied, from the nature of the grant. In *Watkins* on Copyholds, pp. 400, 401., it is laid down, that if the admission be not actually and formally made, the grant would of itself warrant the grantee to enter, as the very act of making the grant necessarily supposes the acceptance of him as tenant; and in p. 406. it is said that an admittance is the acceptance

of him as tenant; and in p. 407., when a grant is made to a person, the very execution and delivery of that grant to him is in itself an acceptance of him as tenant from the nature of the thing. The giving him the rod or accustomed symbol, is the investing him with the possession of the tenement, and not the acceptance of his person; and he also referred to C. B. *Gilbert's Treatise on Tenures*, 282, 283., and 419, 420, 421. 430. 436. Here, too, the payment of a fine imports an admission, for none can be due without admission. *Watkins*, 412. *Gilbert*, 443. 450. 486.

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against
LOVELL.

A. Moore and *P. Williams*, *contra*. The legal title to a copyhold is not complete until admittance. Till admittance, the grantee has no legal interest; and in practice it forms the usual evidence of the grant. The only case where an admittance is not required is where the title accrues by operation of law: but it is necessary, where it accrues by voluntary grant from the lord; and they cited *Gyppen v. Bunney* (a), *Brown's case* (b), *Barnes v. Corke* (c), *Doe, on Demise of Milner, v. Brightwen* (d), *Court-keeper's Guide*, p. 136.

ABBOTT C. J. If there had been any special custom in this manor, making a difference, on the admission of a grantee of an estate in reversion and other estates, it was incumbent on the party who relied upon that custom to prove it. In the absence of any such proof, we must decide this case upon the general custom. Now, by the general law of copyhold, the lord has a right to insist that the tenant shall come in, to be admitted and

(a) *Cro. Elix.* 504.(b) 4 *Rep.* 21.(c) 3 *Lev.* 308.(d) 10 *East*, 585.

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 against
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do fealty and homage. The heir of a copyholder has a good title against every person except the lord, who may command him to come in and do fealty and homage. A surrenderec has no title until he come in and be admitted, because there must be the assent of the lord to the surrender of the previous tenant. But where, as here, the lord makes an original grant, no admittance to a copyhold conformable to the custom of the manor seems necessary, except in cases analogous to those where livery of seisin would be requisite in the grant of a freehold. Now a feoffment is not effectual, till livery of seisin takes place. But a freehold may be granted in reversion, without any livery of seisin; and therefore, reasoning by analogy from the grant of a freehold, it seems to me, that the grantee of a copyhold in reversion has a good and perfect title by the grant, without admittance, and that being so, he may take possession on the death of the tenant for life. And he has, therefore, a right to maintain this action.

BAYLEY J. I am of the same opinion. There is a very plain distinction between the case of conveying an estate from a copyholder to another person, and conveying it from the lord to that person. In the case of a conveyance from one copyholder to another, the copyholder is bound first to convey his estate to the lord by surrender, and when he surrenders his estate to the lord, he does it with the intent that the lord shall grant it out again; the estate remains in the surrenderor till the lord grants it out again. (a) It then vests in the surrenderee, from the period of the surrender; and the lord grants de novo "to hold," which term shews that the title of

(a) *Watkins*, 94. *Cre. Carr.* 283.

the surrenderee is thereby complete; for by that term he accepts him as his tenant. In pleading title to a copyhold, it is only necessary to state that at such a court the lord granted out the estate to such a person, to have and to hold: the surrender and admittance need not be stated. If an admittance, however, after a grant, were essential to make a perfect title, it must be alleged, that the lord granted, and that the tenant was admitted; but that is never done. The truth is, that an admittance by the lord is, in reality, a new grant from him, by virtue of which the surrenderee takes the estate. Now that is the mode by which the property passes from one copyholder to another who is to be a copyholder. But when the estate is in the lord, no surrender is necessary: the lord then actually grants in the first instance; and if admittance were essential, to give effect to such a grant, you would be bound, in pleading, to state, not only that the lord had granted, but that, after granting, the lord had admitted; now that certainly is not usual in pleading. When the lord grants an immediate estate in possession, then, on the ordinary principles which apply to things which lie in livery, there must be seisin, or that which is equivalent to seisin; but that is where the thing lies in livery, being a corporeal hereditament, which is to be possessed instantaneously. In the case of a reversion it is not so: the reversion lies not in livery, but in grant, and the grant is operative from the moment it is made. It has been said that if this be so, in future there will be no necessity for more than one admittance, and that at the time of the original grant. I do not, however, accede to that; for if the copyholders, to whom grants have been made, choose to sell their estates, then the mode of selling will be by surrender into the hands of the

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 ROX
 against
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 Res
 against
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lord; and if it be a life-estate, the lord will accept the surrender on the terms there mentioned; and will then admit the new tenant, and by that admittance will, in point of law, make him a new grant: therefore, wherever there is to be a change of property by the copyholder himself, there must be a surrender and an admittance. It is only in those cases where the party is to claim title by an actual grant from the lord, that an admittance will be unnecessary. I am of opinion, that an admittance applies only to those cases where a surrender is first necessary; and that being so, the evidence was sufficient, and the rule must be discharged.

HOLROYD J. I am also of opinion, that the lessor of the plaintiff is entitled to recover. The cases referred to in the course of the argument, where an admittance in form was considered necessary, were cases of surrender, where the lord makes no grant, except so far as the admittance itself may operate as a grant. In those cases, the estate, in point of law, passes to the lord and then from him, but it does not pass from the surrenderor to the surrenderee, until the lord has done some other act, either by an express admittance, or that which in law amounts to an implied admittance. On that account admittance is necessary in the case of a surrender, before an estate can pass to the surrenderee. This, however, is a very different case: here the lord grants a reversion or a remainder, after the termination of the life-estate, to *Cosh* for his life, at the will of the lord, according to the custom of the manor, immediately after the death of the tenant for life. Now, by that grant, nothing more is requisite to be done by the lord to remove the estate out of him. It is already gone
 from

from him. The grantee is in the same situation as a person claiming as heir. As against third persons, the right of conveyance is in the heir himself: he may assign, he may demise, and he may bring an action of ejectment. Here, on the determination of the two preceding lives, *Cosh* might enter without any further act to be done by the lord. It is laid down in *Comyn's Digest*, tit. Copyhold, G. 4., that any words which shew that the lord accepts a person for his tenant are sufficient. Now here the lord has actually granted the estate to *James Cosh*, *to hold* for his natural life, which word expressly means, that the lord had chosen or had assented to his being tenant; that being so, there is nothing further to be done by the lord to pass the estate to *Cosh*. The latter may therefore assign according to the custom of the manor, or make such demise as can by law be made with respect to copyholds; he has, therefore, a right, by virtue of which he may bring an action of ejectment. I think, therefore, that the lessor of the plaintiff is entitled to recover.

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 ROE
 against
 LOVELESS.

BEST J. I am of the same opinion. This case turns entirely on the distinction between a surrender and a grant. In the case of a surrender there must be an admission, and until there be an admission the lord holds the copyhold as a trustee for the surrenderor, but that is not the case with respect to a grant. It seems to me, that any acknowledgment made by the lord of the right of the tenant to the possession is sufficient; and here, by the terms of the grant, the lord has acknowledged such a right in *Cosh*, by conveying the reversion to him, and *Cosh*, therefore, having a right to take possession, is entitled to support this action. I

H h 4

think,

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 Rex
 against
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think, therefore, that the lessor of the plaintiff is entitled to recover, and that this rule should be discharged.

Rule discharged.

Thursday,
 April 29th.

COCKEY *against* ATKINSON.

Policy on ship for four months, at and from a place to any port or ports whatsoever: Held that an open roadstead (being the usual place of loading and unloading) was a port within the meaning of this policy.

ASSUMPSIT. The declaration set out a policy of insurance upon a vessel called *The Hibernia*, "at and from *St. Michael's*, to any port or ports whatsoever and wheresoever, backwards and forwards, and forwards and backwards, for and during the period of four calendar months, commencing 19th *September*, 1816, and ending 18th *January*, 1817." Plea, general issue. The cause was tried at the *Guildhall* sittings, after last *Hilary* term, before *Abbott C. J.* It appeared on the trial, that the *Hibernia* sailed from *St. Michael's* about the end of *October*, 1816; and on the 1st *November* arrived at the island of *Graciosa*, and remained in an open roadstead there, for the purpose of taking in a cargo, till *November*, 12.; on which day, a storm coming on, she parted from her anchors, and went out to sea. The weather having become more moderate, she returned to the same open roadstead on *November* 18th, where she remained till *November* 22d, on which day another storm came on, and she was again driven out to sea, and totally lost. It appeared that the roadstead was the usual place for loading goods at the island of *Graciosa*. Upon these facts the plaintiff obtained a verdict. And now,

Campbell.

Campbell, with leave of the learned Judge, moved to set aside the verdict, and enter a nonsuit. The policy, in this case, is only at and from *St. Michael's*, to any port or ports whatsoever: it is not to any ports or or places, and there is a material distinction between the two words. "Port" means a harbour, a place of complete security from the weather; and the vessel here had no right to remain taking in a cargo in an open roadstead, exposed to so much risk. And though it must be admitted that this was the usual place of loading at *Graciosa*, that cannot make any difference. It has been held, that where a ship in a policy is warranted free of seizure in port, that a capture in an open road does not fall within those words: that case seems to be an authority in favour of the motion. (a)

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 against
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The Court said, that they thought the words "port or ports," in this policy, which was a time policy, ought to be construed the same as if they were "place or places;" and that under them, the vessel might lawfully unload or take in goods in an open roadstead. If there had been any improper conduct in the master in unloading or loading at a dangerous or unusual place, it might alter the case; but here it was done in the usual and ordinary place in the island of *Graciosa*. The case cited was determined on different grounds: there the vessel was warranted free of seizure in port, because being there, she could not escape, if any attempt to take her should be made; but that reason did not apply to a vessel in an open road.

Rule refused.

(a) 1 Taunt. 517.

1819.

Friday,
April 30th.

Upon the trial of an indictment for a misdemeanor, which continued more than one day, the jury, without the knowledge or consent of the defendants, separated at night: Held that the verdict was not, therefore, void; and that it formed no ground for granting a new trial, it not appearing that there was any suspicion of any improper communications having taken place.

The KING *against* KINNEAR, WOLFE, and LEVI.

THE Defendants were convicted at the last *London* sittings, upon an indictment for a conspiracy. The trial commenced at half past nine in the morning of *Tuesday*, the 20th of *April*, and proceeded until about eleven at night, when the case on the part of the prosecution being ended, the Court adjourned till the following morning. The jury, without the knowledge or consent of the defendants, their counsel, or attornies, separated and went to their respective homes. On the following morning the trial proceeded, and concluded at about seven o'clock in that evening. The fact of the dispersion of the jury was not known to the defendants or their counsel, or attornies, until after the trial had terminated. Upon these facts being disclosed by affidavit, a new trial was now moved for by

Scarlett, *Knowlys*, and *Denman*, who respectively appeared for each of the three defendants. The separation of the jury without the consent of the defendants vitiates this verdict. The principle upon which the law requires the jury to be kept together until they have delivered their verdict, is, that the verdict ought to be founded only on the evidence, coupled with the observation of counsel, and the directions of the Judge. If the jury separate, the parties have no security that their minds may not be influenced by what they may hear during the time of their separation. This principle is sanctioned by the universal practice in all cases of felony, and the nature of the crime ought not to vary the appli-

application of it. The reason of the rule is, the security of those whose interests are to be affected by the verdict. It may, perhaps, be competent to them to dispense with it by consent, although in the *King v. Hardy* (a), the Court refused to suffer the jury to separate, even when the prisoner gave an express assent to it. Any thing tending to influence the minds of the jury, after they are once charged with the issue, avoids the verdict; that appears from (b) *Rogers v. Smith, Co. Litt. 227. b., Roll. Abr. tit. Trial, G.*, and the opinion of the judges, as delivered by Lord C. J. *Herbert*, upon this very point, upon a question put to the Judges by the Lord High Steward presiding at the trial of Lord *Delamere*. (c) The Lord C. J. there stated, as a clear rule of law, that the jury once charged, can never be discharged, till they have given their verdict; and the reason of that is, for fear of corruption, and tampering with the jury. [*Abbott C. J.* The practice has been, of late years, for the jury to separate on the trials of misdemeanors. In *Elizabeth Canning's* (d) case, which continued for fifteen days, the jury separated each night.] That separation having been so often repeated, must have been known to the prisoner or her counsel, and therefore she must be taken to have consented, which makes all the difference. (e) They also cited *Trials per pais*, pp. 219. 222., to shew how jealous the courts have always been of the possibility only that a jury might be tampered with.

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against
KINNEAR
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(a) *Howell's St. Tr.* vol. xxiv. 417.(b) *Palm.* 380.(c) *Howell's St. Tr.* vol. xi. 559.(d) *Howell's St. Tr.* vol. xix. 671., and there see Mr. *Emlyn's* opinion upon this point.(e) See Notes to *Langhorn's* case, *Howell's St. Tr.* vol. vii. 500.

ABBOTT

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The KING
against
KEENEAR
and Others.

ABBOTT C. J. If we entertained any doubt on a question of this sort, which is of so much importance, by reason that the subject-matter of it relates to the trial by jury, I should think it right to pause before we pronounced our judgment. But as we do not entertain any doubt, it is unnecessary to take further time for deliberation. I am of opinion that no sufficient foundation has been laid for the present application. It is grounded on the suggestion of two facts: first, that the jury dispersed before the verdict was given; and, secondly, that that circumstance was not known to the parties until after the trial was concluded. Now it appears, that the trial which had commenced about ten in the morning, had proceeded till eleven at night, before the evidence for the prosecution closed, it then became a matter of necessity to adjourn. For it would been most injurious to the cause of the defendants, that their case should be heard by a jury, whose minds were exhausted by fatigue. It is true, however, that an adjournment is not of necessity followed by dispersion of the jury, for in many cases they are kept together until the final close of the trial. But I am of opinion, that in the case of a misdemeanour, the dispersion of the jury will not avoid the verdict; and I found my opinion upon the fact, that many instances have occurred of late years, in which such dispersion has been permitted in the case of a misdemeanour; and every such instance proves that it may be lawfully done. It is said, indeed, that that these instances have taken place by consent. The consent of the defendant, however, can make no difference, and ought not to be asked. For it is obvious, that he cannot exercise a free choice in such a case, through

through the fear, that if he refuses, it would excite a feeling in the jury adverse to his interests. I am also of opinion, that the consent of the Judge would not make any difference. For if the law requires that the jury shall at all events be kept together until the close of a trial for a misdemeanor, the Judge cannot dispense with it: the only difference between a dispersion with or without the consent of the Judge, seems to be this, that in the latter case, the jury may be liable to be punished for a misdemeanor. But though this may be so, still it will not avoid the verdict. It is not in this case surmised, that during the night any attempt was made to practise on the jury. If that had been so, the Court would most undoubtedly have listened to it, and required the fullest investigation. But that is not suggested here. Upon the whole, it seems to me, that in these cases the law has vested a discretion in the Judge, to allow the jury to go to their own homes, during the necessary adjournment in each particular case; and, therefore, that no sufficient ground has been laid for the present application.

BAYLEY J. It is no part of this application that the verdict is contrary to the evidence, or that a different result could be expected from a new trial; but it is put on this ground, that the jury separated without the consent of the defendants, who knew nothing of the fact till after the trial. It seems to me, however, that this forms no ground for a new trial. In the course of a trial, it frequently occurs that the Judge is occasionally absent; and some of the jury take advantage of that opportunity to leave the court. Now, if the mere separation for a night is a ground for vacating the verdict, it will be difficult to say why those short occasional separations should not have the

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the same effect; but it would be a harsh conclusion, that such a separation would avoid a verdict. If, indeed, the jury separate improperly, the Judge may impose a discretionary punishment upon them for their contempt in so doing; and if the case were one where the propriety of the verdict admitted of doubt, it would be very proper for the Court to take into their consideration, as an additional reason for granting a new trial, that the jury had so separated. But I am of opinion, that that circumstance, standing alone, is not sufficient to vacate the verdict. If we are wrong, the parties may bring a writ of error, and assign the separation of the jury for error. For these reasons, I am of opinion that there ought to be no rule.

HOLROYD J. I do not find any authority in the law which states that the mere separation of the jury in a civil action, or in the case of a misdemeanor, is a ground for vacating the verdict. If that separation has taken place improperly, the jury may be punished for it; or if it be suggested to the Judge at the time, he may, if he thinks it necessary, prevent that separation from taking place. If, in this case, it appeared that the jury had been tampered with, or that this was a verdict against evidence, there would be some ground on which the Court might proceed. Neither of these being suggested, there is no foundation for the present motion; and besides, if this be an objection in point of law, the defendants may avail themselves of it on a writ of error.

BEST J. I am of the same opinion. It is said there has been a mis-trial, on account of the separation of the jury; but I am alarmed at the extent to which that proposition would go. I agree with my Brother *Bayley*,
that

that no sound distinction can be taken between a separation for a shorter or a longer time. If, then, it should appear even after an acquittal, that in the course of the trial any of the jury had been absent for a short time, it would, according to the argument, be a mistrial, and the party would be liable to be tried again: that is an alarming consequence. Lord *Delamere's* case is the only authority that seems to me to bear directly on the point; but the uniform practice of late years must, I think, be considered as overruling that decision. The case in *Palmer* arose after the jury had been charged; and in the cases cited from trials per pais, undue means were used. The true rule is, that it is left to the discretion of the judge to say whether the jury are to be permitted to separate or not: of course, if in his judgment that separation is likely to be detrimental to the ends of justice, he will not permit it to take place. Upon the whole, I agree with the rest of the Court in the opinion that this rule should be refused.

Rule refused. (a)

(a) Vide *Bro. Abr. Verd. pl. 17.* cites 24 *Ed. 3.* 24., and *Bro. Abr. Verd. pl. 19.* cites 14 *H. 7.* 29. Vide, also, 15 *H. 7. 1. pl. 2.* 24 *E. 3.* 24. a. *pl. 10., 2 Hale,* 295. edition 1778. *Barnes,* 441.

LAMBE *against* HEMANS.

Saturday,
May 1st.

ASSUMPSIT for the sum of 218*l.* 19*s.* 10*d.*, being a moiety of the expense of building a party-wall between the houses of the plaintiff and defendant, under

The assignee of the lessee of premises, at a fixed rent, which he considerably improved, and

thereby rendered of greater annual value, is not the owner of the improved rent within the 14 *G. 3. c. 78.*

14 *G. 3.*

1819.

LANIER
against
HEDLEY

14 G. 3. c. 78. Plea, general issue. On the trial at the *Middlesex* sittings, after last *Hilary* term, before *Abbott* C. J., it appeared that all the notices, &c., required by 14 G. 3. c. 78., had been complied with; and the only question was, whether the defendant was, in point of law, the owner of the improved rent. As to which the facts were these: — The premises of the defendant had originally been demised by one *George Cloake* to *William Hall*, at the yearly rent of 105*l.*, for a term of twenty-one years; and *Hall*, for the consideration of 1200*l.*, had assigned over the lease to the defendant, the present occupier. It appeared that they were now worth about 220*l.* per annum, in consequence of improvements made since the demise by *Cloake* to *Hall*. The learned Judge thought that the Defendant was not the owner of the improved rent, and directed a nonsuit. And now,

Gurney, by leave, moved to set aside this nonsuit, and to enter a verdict for the plaintiff. The fair interpretation of the statute must be, that a tenant who has a beneficial lease, from which he might make an improved rent, if he pleased, should be considered as the owner of the improved rent; and so it seems to have been laid down by *Gibbs* C. J., in *Stuart v. Smith*. (a) The circumstance there relied on was, that he had asked 300*l.* for his lease; and here the party has a lease which appears to be of much greater value. If this be not so, there will exist cases in which there will be no owner of the improved rent at all, for the owner of the ground-rent is not liable, *Peck v. Wood*. (b) And if the circum-

(a) 2 *Marsh.* 436.(b) 5 *T. R.* 130.

stance

stance of the person who builds residing in the house himself makes him not liable, there will, in such cases, be no one who is bound to contribute. That is a consequence directly contrary to the object of the act. Here, if the defendant had underlet the house at the rent of 220*l.*, he would clearly be liable, *Sangster v. Birkhead*. (a)

1819.

 LAMBE
 against
 HERMAN.

ABBOTT C.J. This case seems exactly within that of *Beardmore v. Fox* (b), the authority of which is by no means shaken by what fell from L. C. J. Gibbs, in *Stuart v. Smith*. In that case, the premises were let for 100*l.* originally; and in consequence of subsequent improvements by the tenant, became of the improved value of 180*l.* per annum. Yet the Court held, that the party who occupied was not there to be considered as the owner of the improved rent. The only difference between the cases, is in the amount of the improvements, which can make no difference; for no solid distinction can exist between an improved value of 50*l.* and one of 500*l.*, in point of law. It is to be observed, that the words of the act are, "owner of the improved rent," and not "owner of the improved value;" and we must construe it according to those words, and not according to others which we might think would have been more applicable to the justice of the case. There may be a distinction between the ground rent and the improved rent; but here the premises were originally let by *Cloake*, at an improved rent. The nonsuit, therefore, was right.

Rule refused.

(a) 1 *Bos. & Pull.* 303.(b) 8 *Term Rep.* 214.

1819.

Saturday,
May 1st.BULWER, Clerk, *against* BULWER, D. D.

By his induction the parson is put in possession of a part for the whole, and may maintain an action for a trespass on the glebe land, although he has not taken actual possession of it.

A parson who resigns his living is not entitled to emblements.

TRESPASS for breaking and entering several closes of the plaintiff, and reaping and carrying away his corn, hay, &c. Plea, general issue. At the trial at the last *Lent* assizes for the county of *Norfolk*, before *Graham B.*, it appeared that the defendant had been the rector of the parish of *Sall*, and that he had resigned that living on the 21st *May*, 1818. The plaintiff was presented on the 4th *June*, and was instituted to it on the 7th *July*, and afterwards inducted. The defendant retained possession of the glebe lands till *Old Michaelmas-day* following, and severed and took the crops of hay, corn, &c. which had been previously sown. The jury found a verdict for the plaintiff, damages 188*l.* And now

Frere Serjt. moved to enter a nonsuit, or for a reduction of the damages. On the first point, he contended that the plaintiff had not sufficient possession of the glebe lands to entitle him to maintain trespass, and for this he cited 2 *Roll. Abr.*, 553. *pl.* 45.: "Plaintiff cannot maintain trespass *quare clausum fregit*, if he has not actual possession, though he has the freehold in law, as an heir shall not have trespass against an abator." [*Abbott C. J.* By the act of induction, the parson is put into the actual possession of a part for the whole, and he can therefore maintain trespass. It is not necessary that he should actually go upon the glebe itself.] Then, with respect to the second point, he contended that the verdict should be reduced to the sum
of

of 80*l.*, being the value of the tithes of the crops in question. In *Moyle v. Ewer* (a), it was laid down by *Coke* C. J., that if a parson sows the ground and is afterwards deprived or *doth resign*, if the corn was not severed at the time of the successor's coming in, he shall have the tithe. And in *Degge*, ch. 2. p. 2., if the parson, vicar, &c. sow the land, and be deprived, *resign*, or accept another living, the successor shall have the tithes. And in *Gibson's Codex* (b), title "Rules of canon and common Law concerning Glebe," it is said, "if the parson dies after severance from the ground and before the corn is carried off, the successor shall have no tithe, because, though it was not set out, yet a right to it was vested in the deceased parson by the severance from the ground. *The same is true in case of deprivation or resignation after glebe sown, the successor shall have the tithe if the corn was not severed at the time of his coming in, otherwise if severed.*" So that from all these authorities, it appears, that even in the case of resignation before severance, the successor is only entitled to the tithes of the crop arising from the glebe, and not to the crop itself.

1812.

Bulwer
against
Bulwer.

ABBOTT C. J. The general rule of law applicable to cases of this description is, that where a tenant of land has an uncertain interest which is determined either by the act of God or the act of another, there he shall have emblements: but that is not so where the tenancy is determined by his own act. That is laid down in a variety of instances, which will be found in L. C. Baron *Comyn's Digest*. (c) As where the lessee

(a) 2 *Bulstr.* 184.

(b) Vol. i. p. 661.

(c) *Blens*, G. 2.

1819.

BULWER
against
BULWER.

surrenders, or a woman who is tenant durante viduitate marries, or the estate determines by forfeiture, condition broken, &c. In all these cases they are not entitled to emblements. It seems to me, that this case is precisely the same in principle, and ought to follow the same rule. And the authorities cited are much too loose for the Court to act upon in opposition to so old and so established a rule of law. The lessee of the glebe of a parson who resigns is in a different situation, for his tenancy being determined by the act of another, he will be entitled to emblements.

Rule refused.

Saturday,
May 1st.

**DOE, on the Demise of COTTERILL, against
WYLDE.**

The Court refused to set aside the verdict in ejectment, on the ground that there was a variance between the description of the premises in the nisi prius record (upon which the plaintiff recovered) and the issue; it not being stated how the premises were described in the declaration delivered.

EJECTMENT for two messuages, &c. The issue delivered stated premises to be situate in the parish of *Wimbledon*, in the county of *Worcester*. The nisi prius record stated the premises to be situate in the parish of *Himbleton*, in the county of *Worcester*. At the trial at the last assizes for *Worcester*, before *Richardson J.*, the lessor of the plaintiff proved a title to premises in the parish of *Himbleton*, in the county of *Worcester*, and had a verdict.

Campbell now moved to set aside this verdict, on an affidavit that the name of the parish in the issue delivered was *Wimbledon*; that no judge's order had been obtained, nor any consent given on the part of the defendant, to amend the issue, or to alter the nisi prius record

record from the amended issue; and that the defendant went down to trial relying upon this objection.

1819.

Dox
against
WYLDK.

But the Court refused the rule, on the ground that the affidavit did not state how the premises were described in the declaration; and they said that they suspected that the premises were properly described there; and if so, it was the duty of the defendant to have returned the issue, as not corresponding with the declaration.

Rule refused.

HOLROYD *against* BREARE and HOLMES.

Saturday,
May 1st.

TRESPASS for breaking and entering plaintiff's house, and seizing and taking his cattle, goods, and chattels. The defendants pleaded first the general issue, and, secondly, justified the one as steward of the court baron of the manor of *Wakefield*, and the other as his bailiff, stating, that on the 12th of *September*, 1817, at a court of the said manor, holden before certain then suitors of the said Court, according to the custom of the said court, one *J. A.* levied his plaint against *Sarah Holroyd*, and afterwards recovered on the plea aforesaid against her 9*l.* 14*s.* for his damages and costs; and the defendant, *Breare*, on the 5th of *December*, 1817, as such steward of the manor, caused his precept to be issued, to take the goods of the said *Sarah Holroyd* in execution, which precept was delivered to the defendant, *Holmes*, as bailiff, to be executed, and that by virtue of that precept, the goods in question were by him seized, and the trespasses com-

The steward of a court baron is a judicial officer; and trespass will not lie against him where his bailiff by mistake took the goods of *B.* under a precept commanding him to take in execution the goods of *A.*

1819.

~~HOLROYD~~
~~vs.~~
~~BREARE.~~

mitted. There was another similar justification, setting out a judgment recovered in the same court, at the suit of *J. C.* against *Sarah Holroyd*. At the trial at the last Summer assizes for the county of York, before *Bayley J.*, the principal question was, whether the goods which had been seized were wholly or in part the property of the plaintiff, or of *Sarah Holroyd*. The jury found a verdict for the plaintiff. It appeared also, that the defendant, *Breare*, was not in any respect personally concerned in the seizure of the goods, but only as having, in his character of steward of the court baron, signed the precept for taking *Sarah Holroyd's* goods in execution. Upon this *Scarlett* contended, that he was, in this case, acting in a judicial and not a ministerial capacity; and that, therefore, he was not liable for the acts of his bailiff. On the other hand, it was argued, that he was only in the nature of a minister of the court baron, of which the suitors are the judges, and that, therefore, he was, like any other ministerial officer, responsible civiliter for the acts of his bailiff. The learned Judge reserved the point, giving leave to the defendant, *Breare*, to move to have a verdict entered for him, in case the Court should be of opinion that he was not liable. A rule nisi to this effect having been obtained in last *Michaelmas* term,

Cross Serjt., and *Tindal*, shewed cause in last *Hilary* term. The steward of a court baron is merely a ministerial officer; for the pleadings in this case state, that the court is holden before the suitors, who are the judges of the court; and it is the duty of the steward, as their minister, to see that their judgments are executed properly. There are many authorities which shew.

shew this. Lord *Coke*, speaking of the court baron, says, "This is a court incident to every manor, and is not of record, and the suitors be thereof judges, although the plea be holden by force of a writ of right." (a) So again, "And it is to be understood, that this court is of two natures: the first is by the common law, and is called a court baron, as some have said; for that it is the freeholders or freeman's court, (for barons, in one sense, signify freemen,) and of that court the freeholders being suitors be judges, and this may be kept from three weeks to three weeks. The second is a customary court, and that doth concern copyholders, and therein the lord or his steward is the judge. And as there may be a court baron of freeholders only, without copyholders, and then is the steward the register; so there may be a customary court of copyholders only without freeholders; and then is the lord or his steward the judge." (b) And in *Bro. Abr.*, tit. *Court Baron*, pl. 11., there is this passage: "Nota, per Choke Justice, that in court baron, county, or hundred, the suitors are judges, and the bailiff and sheriff are only ministers." And the steward falls within the same reason, as appears from another passage in the same book, tit. *Judgment*, pl. 118., "Nota, that the suitors are the judges in county court, court baron, and hundred, as well in writ of right patent, as in justicies, and other suits there; and the sheriff, steward, and bailiff are not judges there, quod nota bene." Then it is clear, from the evidence, that the steward, in this case, is only a ministerial officer; and if once that is established, the question is at an end. For though no action will lie against a judge, for

1819.

Holcroft
against
Barnard.
(a) 4 *Inst.* 268. c. 57.(b) 1 *Inst.* 58.

1819.

—————
HOLROYD
 against
BREAR.

what he does judicially, though it should be laid falso malitiose et scienter, as it is laid down by *North C. J.* in *Soames v. Barnardiston* (a), yet it is otherwise in the case of a ministerial officer. And the maxim of law “respondeat superior” applies to that case. The steward here is answerable precisely on the same principle as the sheriff is, viz. that the law holds it to be his duty to execute the office in person; and, therefore, makes him answerable, civiliter, for the acts of his officer.

Scarlett and Parke, contra. The circumstance that no instance can be produced in which such an action as the present has ever yet been maintained, goes strongly to shew that the steward is not liable. For the thing must often have happened before. The distinction between this case and that of the sheriff is obvious; for the sheriff is no part of the court out of which the process issues; but the steward of a court baron is so, and his situation is rather to be compared to that of the signer of the writs in this court, who is surely not liable in case of a mis-execution of any of them by the sheriff. The passages cited only shew, that the steward of a court baron is a minister of that court for some purposes, as, for instance, to register their proceedings, and the like. But they do not shew, that he is their minister, for the purpose of executing their process: and if so, he is not liable, when the process is improperly executed.

Cur. adv. vult.

(a) 7 St. Tr. 442. 6 Howell, 1094.

ABBOTT

ABBOTT C. J. now delivered the opinion of the Court. This was an action of trespass, in which the plaintiff obtained a verdict upon the general issue, against both these defendants; and upon a motion having been made to set aside the verdict, {and to enter a verdict for the defendant, *Breare*, the Court took time to consider of their judgment. It was contended, in argument, that the defendant, *Breare*, being the steward of a court baron, was merely the minister of that court, to execute its process, and was not clothed with any judicial character; and it was said, that his warrant to the other defendant was analogous to that of the sheriff to his bailiff, and rendered him, like the sheriff, civilly responsible for the mis-execution of it. This was contended, on the ground, that in the court baron the free suitors are the judges; and certainly they are so, for the purposes stated in the authorities which have been cited. We are, however, of opinion, that the steward is not merely a minister of that court, but a constituent and essential part of it. The Court cannot be holden without him. No mandate is directed to him as an officer; but he makes his mandate to the bailiff. And there is this material distinction between the mandate of the sheriff and that of a steward of a court baron: in the former, the sheriff commands the bailiff to make the levy, and it concludes thus, "So that I may have the same before the court, &c." But in the warrant of the steward, the bailiff is directed to levy, so that he the bailiff may may have the same before the Court on the day appointed. This, therefore, is more like the writ of the superior court to the sheriff than the warrant of the sheriff to his bailiff. That seems to be decisive, to
shew

1819.

 HOLBOYD
 against
 BREARE.

1819.

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Holbech
 against
Barnard.

shew that the bailiff and not the steward is the minister of the court baron, for the execution of its process, and that he is not the servant of the steward in this respect. We are, therefore, of opinion, that the steward is not for this purpose a minister, but part of the Court itself. And if so, this action is not maintainable against him, and the rule for entering a verdict for him must therefore be absolute.

Rule absolute.

Monday,
May 3d.

RIPPINER against WRIGHT, Clerk.

Where an agreement on unstamped paper has been destroyed, no parol evidence can be given of its contents, even if it has been destroyed by the wrongful act of the party who takes the objection.

ASSUMPSIT for a crop of peas, bargained and sold by plaintiff to defendant. Plea, non assumpsit as to part, and a tender of 6*l.* 3*s.* 9*d.* as to the residue. At the trial before *Burrough J.*, at the Spring assizes for the county of *Northampton*, the defendant proposed to give parol evidence of an agreement between him and the plaintiff, that the latter should not be paid for the value of the crop, but only for the expense of ploughing and seed sown. It appeared that this agreement had been reduced into writing, on unstamped paper; and that afterwards the plaintiff took an opportunity to snatch it from the hands of the defendant's attorney, and to destroy it. *Holbech*, for the plaintiff, objected that no parol evidence of the contents of this paper could be received, inasmuch as the paper itself could not, if in existence, have been read, not being stamped. On the other hand, it was contended that the plaintiff, by his act in destroying the paper, had prevented the defendant from getting it stamped, as he might have done
on

on payment of the penalty; and that therefore it was not competent for him to make this objection. The learned Judge rejected the evidence, and the plaintiff obtained a verdict. And now

1819.

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Ripstick
against
Walton.

Denman moved for a new trial, on the ground that the learned Judge had improperly rejected the evidence; and contended that the plaintiff ought not thus to have been permitted to take advantage of his own wrongful act.

Per Curiam. The evidence was properly rejected. It is the duty of the parties to an agreement to take care that when it is executed it is properly stamped; and it is one of the risks attendant upon an omission to do this, that if any accident happens to the agreement before the stamp is affixed, there is no remedy upon it whatsoever. It is not possible now to say, whether or not the commissioners of stamps, in the exercise of their discretion, would have permitted this agreement, if it had remained in existence, to be stamped on payment of the penalty.

Rule refused.

The KING *against* TREVENEN.

IN this case *Gaselee* had obtained another rule nisi for a quo warranto against the defendant, to shew by what authority he claimed to be mayor of *Helleston*

It is in the discretion of the Court to grant a quo warranto information or not: and un-

der circumstances tending to throw suspicion on the motives of the relator, the Court will not grant such application where the consequence will be to dissolve a corporation;

upon

1819.

—
The King
against
TARVERER.

upon and from the 16th day of *November*, 1813, until the 25th *September* 1814. The rule was obtained under the same circumstances as have been already (a) stated. The present application was made on the affidavit of *Christopher Wallis* an attorney, resident at *Helleston*, who stated that he was a freeman of that borough, and that he had not concurred in the election either of *Thomas Grylls* to the office of mayor on the 26th *September*, 1813, nor in that of the present defendant or any subsequent mayor. He further swore that he intended to prosecute the quo warranto, if granted, at his own expense, and that the present application was made at his own instance and expense, and without any agreement or promise of any person or persons for his being reimbursed, nor did he expect to be reimbursed the expenses, or any part thereof, by any person or persons whomsoever. The affidavits on the other side set forth the same facts and declarations of *Sir Christopher Hawkins*, that he would dissolve the corporation, &c., as in the former application, and added, that *Mr. Wallis*, the present relator, was a partizan of *Sir C. H.* at the last election; that he lent him his house, voted for his interest, and was the partner of *Mr. Roberts*, his avowed law-agent on that occasion.

Warren shewed cause. It is to be observed that the applicant only means, that there is no agreement or expectation entertained by him that he shall be reimbursed. It is quite consistent with this, that he may have already received the money for this purpose. Besides, what proper motive can a freeman of this

(a) Ante, p. 339. The relator not filing additional affidavits, the rules were discharged.

corpor-

corporation have in dissolving the corporation? for that is to be the consequence of the present motion. In *R. v. Stacey* (a), Lord *Mansfield* puts it on this ground: he says, "The Court is bound to guard the quiet of corporations, and the stat. 11 G. 1. c. 4. was passed in order to insure them security and tranquillity." And besides the circumstances in which the present relator stands are strongly demonstrative of the fact, that this is a continuation of the same attempt before made by Sir *C. Hawkins*; for the present relator is nearly connected with him, and is the partner of his avowed law-agent, and an active friend to his interest. Here nearly six years have already elapsed before any objection has been taken.

1819.

The King
against
TREVENEN.

Gaselee, contra. If the Court is to be astute in inquiring into the motives of parties, there will soon be an end of quo warranto informations. It is hardly to be supposed that any person on the opposite interest to Sir *C. Hawkins* will come forward to object to these defects. But it is quite enough if, as here, all connection with that person, as to this motion, is denied by the relator. He swears that it is made at his own expense, and there may be many legitimate motives why he may wish this corporation to be dissolved. For he may hope to have a fresh charter more favourable to the general interest of the town. All that is necessary is, that the relator should apply bonâ fide, and that is sworn to be the case here. In *Rex v. Cudlip* (b) the Court on a second application granted the rule, and judgment of ouster was afterwards obtained. Yet the

(a) 1 T. R. 1.

(b) 6 T. R. 503.

circum-

1819.

The King
against
TAYLOR.

circumstances there were in all respects similar to the present.

ABBOTT C. J. Where a corporation acts contrary to the franchises which have been granted to it, and invades the rights of the crown, the *Attorney-General*, of his own authority, and without any application to this Court for leave, may exhibit an information against them. But in the case of individual members of the corporation the case is different; for then it is wholly within the discretion of this Court to say, whether such an information ought to be granted or refused. The Court, undoubtedly, have, in some cases, permitted these informations to be filed, where the effect has been thereby to dissolve the corporation; but that has been where strong cases have been made out. Here, all that appears is this, that about five or six years ago, the select body in this corporation nominated two persons for the office of mayor, one of whom happened to have filled the inconsistent offices of recorder and alderman at the same time. That union of offices, it appears from some other cases which have been before the Court, had existed in other neighbouring boroughs, and was not known or supposed at the time to be illegal. The objection, therefore, to the title of the defendant is not one which the Court would be inclined to favour. Then, when we consider, in addition to this, that this application is made at the instance of an acknowledged partizan of Sir *C. Hawkins*, and that this latter person has expressed a determination, that in order to obtain parliamentary influence, he would dissolve this corporation, I think we shall best exercise the discretion vested in us by discharging the present rule.

Rule discharged.

1819.

The KING against The Inhabitants of POLES-
WORTH.Wednesday,
May 5th.

TWO Justices, by their order, removed *James Barwel*, *Sarah* his wife, and their four children, from the parish of *Kingsbury*, in the county of *Warwick*, to the parish of *Polesworth*, in the same county. The sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case. The pauper was hired by Mr. *Hay* of *Polesworth*, at *Polesworth* statutes, a fortnight before *Michaelmas*, 1799, as waggoner's lad, at 3*l.* 10*s.* wages for a year, commencing from the day after *Falseley* fair, the Tuesday after *Michaelmas*-day. The pauper remained in the service at *Polesworth* till a fortnight before *Michaelmas* in the following year, when he went to *Middleton* statutes, having previously asked his master's leave, who refused to let him go there. The following day the pauper asked his master what work he was to do; the master told him that he might go where he had been the day before, and that he would not employ him any more. The pauper asked the master to pay his wages, and said if he did, he would go. The master refused, and said he would obtain a summons, which he did; but neither of them attended the magistrate on that summons. The pauper left his master's house on the day the summons was served: two days afterwards, the pauper called at his master's house; and the same day they both went to *Polesworth* statutes, when the pauper hired himself to a new master, from the day after the next *Falseley* fair. On the day after *Polesworth* statutes, the pauper summoned

Where a pauper, being hired for a year, and having served till within a few days of the end of the year, went, without his master's leave, to the statutes to hire himself for the next year; and on the master dismissing him for that, went before a magistrate with his master, and there offered to serve his year out; but upon receiving his full year's wages, was satisfied, and did not return to his service; but neither hired nor offered to hire himself into any fresh service till the year had expired: Held that this amounted only to a dispensation with his service for the remainder of the year, and that he thereby gained a settlement.

1819.

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The King
against
The Inhabit-
ants of
Poleworton.

moned his master before the magistrate. When before the magistrate, the pauper, in answer to a question put to him by the magistrate, said he was willing to serve his time out; but the master said he would not take him again. The magistrate then directed the master to pay the pauper his whole wages: which the pauper took, and was satisfied; and went to his grandfather's, where he remained till the day after *Falseley* fair, when he entered upon his new master's service.

Adams and Finch, in support of the order of sessions. The question in this case is, whether what took place before the magistrate amounted to a case of dispensation or dissolution; and if there was any evidence upon which the sessions might draw the conclusion in favour of the former, this Court will not disturb the conclusion which they have drawn, *Rex v. Maidstone*. (a) The circumstances in this case shew that the master had no reasonable ground for dismissing the pauper, *Rex v. Islip*. (b) Here, the pauper received his full year's wages; and there is this additional circumstance, that he neither entered nor offered to enter into any other service, till after his year had expired. That distinguishes this case from those of *Rex v. King's Pyon* (c), and *Rex v. Leigh* (d), which will be relied on by the other side. And it appears from the judgment of *Le Blanc J.*, in *Rex v. Hardhorn-cum-Newton* (e), that that circumstance is most material. They were then stopped by the Court.

(a) 12 *East*, 550.(c) 4 *East*, 354.(d) 7 *East*, 539.(b) 1 *Str.* 423.(e) 12 *East*, 56.

Reynolds

Reynolds and Holbeck, contra. The test to which all these cases must be brought is laid down by the case of *Rex v. King's Pyon* (a); for there Lord *Ellenborough* says, that where the parties stand in such a situation that neither the master can compel the servant to come back into his service, nor the servant can compel the master to take him back, and neither of them have any legal means of compelling redress against the other, there is a dissolution of the contract. Now, if this case be tried by that test, it is quite clear that the master, by his payment of the full year's wages before the magistrate, lost all right of compelling, after that, the pauper to return to his service; and the pauper, by accepting the wages, and declaring himself satisfied, lost all right of compelling the master to take him back. The only circumstance which is said to distinguish the two cases is this, that in *Rex v. King's Pyon* the pauper offered her services to other persons; but that was only evidence from which her satisfaction at the arrangement might be inferred: and here the sessions have found, as a fact, that the pauper was satisfied. The same observation applies to *Rex v. Leigh*. Besides, in this case, the pauper was a servant in husbandry, over whose contract a magistrate has a jurisdiction.

ABBOTT C. J. It seems to me, that the court of quarter sessions were quite right in refusing to consider this as a case in which the contract between the parties was dissolved. There can be no dissolution without a mutual consent of the parties, or some justifiable cause of complaint on the part of the master; but here he

(a) 4 *East*, 354.

1819.

The KING
against
The Inhabit-
ants of
POLESWORTH.

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**The King
against
The Inhabit-
ants of
Polarworn.**

quarrelled with the pauper without sufficient reason, for the pauper had done no more than according to *Rex v. Islip* he had a right to do. There was therefore no justifiable ground for dismissal. Then is there any mutual consent? It appears that the parties went before a magistrate, and the pauper then stated that he was willing to continue in the service: the master, however, peremptorily refused, upon which the pauper, after receiving his full wages, said that he was satisfied; but he neither contracted nor offered to contract any other service. And I think that there is nothing in this case to shew, that if on the following day his master had ordered the pauper to return into his service, he would not have been bound so to do. I think, therefore, that the order of sessions was right.

BAYLEY J. The case of *Rex v. Islip* seems to me to be in point. There the servant, as in this case, after having been refused permission to go to the statutes for the purpose of getting another place, went without such permission; and the master refusing to receive him back, the Court held that it amounted only to a dispensation, and not to a dissolution of the contract. In the two cases which have been cited, the servant either contracted or offered to contract a service with another master, and that materially distinguishes them from the present case, as appears from *Rex v. Hardhorn* with *Newton*. The only grounds for deciding in favour of a dissolution, are either mutual consent or some wrongful act of the servant; but here all that is stated is a wrongful act on the part of the master. And as to the servant stating that he is satisfied, that is easily to be explained; for

for his whole wages being paid, he was satisfied that the remainder of his service should be dispensed with.

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The KING
The Inhabit-
ants of
against
POLESWORTH.

HOLROYD J. There is nothing in this case stated to shew, with sufficient distinctness, that the servant consented to put an end to his contract. I think that his not having contracted any other service before the end of the year inconsistent with his return to that of his master distinguishes this case from those which have been cited.

BEST J. concurred.

Order of sessions confirmed. (a)

(a) Vide *Rex v. Whittlebury*, 6 T. R. 464., and *Rex v. Sudbrook*, 4 East, 556.

The Right Hon. CHARLES Earl of SHREWSBURY,
against GOULD, surviving Executor of JOHN
GILBERT, deceased.

Friday,
May 7th.

COVENANT. The declaration stated that George Earl of *Shrewsbury*, since deceased, being seised of the demised premises in fee, by indenture, dated *January 1st*, 1761, demised to *John Gilbert* all that limestone that then was or thereafter might be found out by digging, sinking, or otherwise however, lying or being in certain commons or common lands, unclosed, then called or known by the name of *Ribden Stones* or *Ribden Flatts*, or commons, where the limekilns then were, or upon any other waste land or com-

Where a lessee covenanted that he would at all times and seasons of burning lime supply the lessor and his tenants with lime at a stipulated price for the improvement of their lands and repair of their houses: Held that this was an implied covenant also that he would

burn lime at all such seasons, and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied.

1819.

—
 Earl of
 SHREWSBURY
 against
 GOULD.

mons within the manor of *Alton*, with free liberty to and for the said *John*, his executors, administrators, and assigns, from time to time, and at all times during the term thereby letten, to dig, search, sink, and trench in upon the aforesaid commons, and every part thereof, at his and their wills and pleasure, for the finding out and raising up of the said limestone, and to build kilns for the burning and converting the same to lime for the use and benefit of the said *John*, his executors, administrators, or assigns; and the said late earl, his heirs and assigns, did thereby further agree, that if there should be an opposition, and other kilns built by any other person or persons in other lands, so as to lie nearer to the sale of the aforesaid kilns, then and in such case it should and might be lawful to and for the said *John*, his executors, administrators, and assigns, to erect one lime-kiln within any of the inclosed land in the said manor of *Alton*, or township of *Farley and Cotton*, belonging to the said late earl, and to get the stone therein to supply the said kiln, save and except out of the said grant and demise, for the said late earl, his heirs and assigns, his and their agents, servants, workmen, tenant or tenants, for the time being, liberty to get limestone, build kilns, and burn to lime the said stone for the use and benefit of the said late earl, his heirs and assigns, his or their tenant or tenants, for improving their estates for their own use, and not otherwise, or to get the said stone for any other use that might be wanted; to have and to hold all and singular the said demised limestone unto the said *John*, his executors, administrators, and assigns, for the term of ninety-nine years, if *Thomas Gilbert*, *Robert Gilbert*, and *John Gilbert*, or any or either of them, should so

long live, yielding and paying a certain yearly rent. And it was further agreed, that the said *John Gilbert*, the lessee, his executors, administrators, and assigns, should at all times and seasons of burning of lime, supply, furnish, sell, and fit the said late earl, his heirs and assigns, or any of his tenants, within the county of *Stafford*, for the improvement of the land, buildings, or repairing the buildings, at four-pence for every horse-load, being three computed strikes of good lime at the kiln, and so in proportion for every greater or lesser quantity that he or they shall want. The declaration then proceeded to set out the entry of the lessee, the death of the lessor, and the descent of the reversion to the plaintiff as heir at law. It then stated, that during the continuance of the term, on the 14th *April*, 1818, being a time and season of burning of lime, at *Stow* aforesaid, in the said county, the said plaintiff having occasion for a large quantity, to wit, twenty horse-loads of lime, each horse load being three computed strikes, for the improvement of the land and buildings of him the said earl, within the said county of *Stafford*, did request and demand of and from the said *Nathaniel*, so being such surviving executor as aforesaid, to supply, furnish, sell, and fit him therewith, at the said kiln, for the improvement of his said land and buildings, and was then and there ready and willing to pay, and offered to pay to the said *Nathaniel*, four-pence for every horse-load of lime, according to the form and effect of the said indenture; and then alleged a breach on the part of the defendant in not supplying the lime so demanded.

The defendant, after craving oyer, and setting out the indenture, by which it appeared that the yearly rent

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reserved was 10*l.*, pleaded, first, that he did not for a long time before the said fourteenth day of *April*, 1818, nor at any time from thence hitherto, burn or convert into lime, nor was there during all or any part of that time, burnt or converted into lime, by the said *Nathaniel*, or any servant or servants of his, or on his account, any limestone raised, gotten, found, or produced, from, out of, in, or upon the said demised premises, or any part thereof, the enclosed land in the said manor of *Alton*, or any part thereof, or the township of *Farley* and *Cotton*, or either of them, or any part thereof. Secondly, that there was not at the time of such request and demand, as in the declaration mentioned, nor for a long time before, nor has there been at any time hitherto, any lime upon the said demised premises, or elsewhere, which had been produced or made by or from limestone raised, gotten, found, or produced, from or out of the said demised premises, or any part thereof, or from, in, or out of the inclosed land, in the said manor of *Alton*, or any part thereof, or from, in, or out of the said townships of *Farley* and *Cotton*, or either of them, or any part thereof, and which had been burnt or converted into lime in any kiln or kilns on the said demised premises, or any part thereof, or within the said manor and township, or any of them, or elsewhere, by the said *Nathaniel*, or any person or persons acting by or under his authority, or in his power or possession, or otherwise, by or wherewith the said *Nathaniel* could have supplied, furnished, sold to, or fitted, the said quantity of lime so demanded. And thirdly, that before any such demand as in the declaration mentioned was made, all the lime produced from limestone raised, found, gotten, or produced from, in, out of the said demised premises,

premises, or the inclosed land within the said manor, or within the townships of *Farley* and *Cotton*, by the said *Nathaniel*, or any persons or persons claiming by, through, from, or under him, or by or under the indenture in the declaration mentioned, had been fairly sold, disposed of, taken, or carried away, from and off the said demised premises, inclosed lands, and townships, and that there was not at the time of such demand, or at any time hitherto, any lime which had been burnt by the said *Nathaniel*, or any person or persons by his authority, or claiming by, from, or under him, or under or by virtue of the said indenture in the declaration mentioned, wherewith he the said *Nathaniel* could have supplied, furnished, sold to, or fitted the said quantity of lime so demanded. Demurrer and joinder.

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Peake, in support of the demurrer. The question arises on the construction of the defendant's covenant to supply lime at a given price; and it is in fact this, whether he can excuse himself from the performance of it by his own act in refusing to burn any lime whatever. The words are, that defendant shall so supply lime, at all times and seasons of burning lime; which must mean, at all times and seasons when it is usually or conveniently burnt; and being a covenant by the defendant, it must be construed most strongly against him. Here, only a small rent is reserved; and it is obvious from the whole instrument, that the principal remuneration which the landlord was to receive for the lease was the benefit resulting to him under this covenant. According to the defendant's construction, he is to be at liberty to get as much limestone in a raw state, for

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sale, as he shall please and only pay the rent of 10*l*. But the true rule is given in *Griffith v. Goodhurst* (a), where it is said that you must construe a covenant according to the intention apparent on the whole contract; and that intention most obviously here is, that the defendant should not only get limestone, but also burn it into lime; and if by his own act he makes it impossible to fulfil his covenant, that is a breach of it. Sir *Anthony Mayne's* case. (b)

Puller, contra. The first part of this lease grants to the lessee free liberty to dig the limestone at his will and pleasure, for burning and converting the same into lime. Now if the construction contended for by the plaintiff be adopted, it will no longer be a burning at the free will and pleasure of the lessee, but at that of the lessor. The words are "at all times and seasons of burning lime:" now this means only when the defendant shall burn lime, which of course he will do whenever, from the demand in the market, it is profitable to him so to do. But in the way the other side construe it, it amounts to this, "at all times when lime can be burned," which is at all times: then if so, the lessor may compel this lessee to burn for him at this stipulated price constantly, and if he chooses to lay up any indefinite quantity of it at the lessee's expense, he may do so; but then what necessity was there for the reservation to the lessor himself of a power to burn lime for his own and his tenants' use. Taking the whole together, it may be construed thus: the lessor is entitled to receive lime at the stipulated price, whenever

(a) *Sir T. Raym*, 464.(b) 5 *Coke*, 21.

the lessee burns for sale. If circumstances prevent the lessee from so doing, then the reservation empowers the lessor to burn for himself; and the lease should be construed, if doubtful, in favour of the lessee. *Rhodes v. Bullard* (a) is precisely in point; there the defendant covenanted that the plaintiff should have the use of the pump in his yard jointly with him whilst the same should remain there, paying half the expences of keeping it in repair; yet it was held that he was not liable for a breach of covenant in taking away the pump altogether. So here, the covenant is, in fact, to furnish him whilst the defendant continues to burn it; and if he discontinues to do that, it is no breach of the covenant.

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Peake, in reply, was stopped by the Court.

ABBOTT C. J. It appears manifestly, from the whole lease, to have been the intention of the parties that the lessee should not only raise limestone, but also burn it into lime; and that he should at all times and seasons (by which I understand the usual seasons of burning lime) furnish and sell lime at a given price to the lessor and his tenants within the county of *Stafford*, for the improvement of their lands. The lessee, however, contends that he may, under this covenant, get the limestone and not burn it into lime, and that by so doing he is exempted from the burden of selling it at the stipulated price to the lessor. There are two of the previous clauses in this instrument which throw considerable light on this subject, and prove that the construction contended for by the plaintiff is the rea-

(a) 7 *East*, 116.

sonable

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reasonable construction for the Court to adopt. By the first of these the lessor grants that, in case there should be any opposition and other kilns should be built by any other persons, so as to lie nearer to the sale than the kilns of the lessee, it should be lawful for him to erect a kiln within the enclosed lands belonging to the earl, and to get limestone there; and in the other clause the lessor was himself prohibited from getting any limestone, even in his enclosed lands which were not demised, and burning it into lime for sale. So that it clearly appears that the object of this lease was to secure to the lessee, as far as was possible, the sole power of burning lime for sale; and it is not unreasonable, therefore, that, he should covenant in return for this, to burn lime, and, at the usual seasons, to furnish the lessor with a sufficient quantity for the improvement of his estate. The provision by which Lord *Shrewsbury* reserved to himself the right of burning lime for the improvement of his estate seems to me to be cumulative, and not to restrain this covenant of the lessee. I think, therefore, that the lessee has no right now to say that he chooses to get limestone, and not to burn it into lime, and so to escape the performance of this covenant. If so, it follows that there must be judgment for the plaintiff.

BAYLEY J. I am of the same opinion. The rule of law is, that a covenant is to be taken most strongly against the covenantor: in this case, the words of the covenant are general. It is not said that the lessee is to furnish lime at all times when he the lessee burns lime, but at all times and seasons of burning lime; which seems, therefore, to refer to known seasons for
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that purpose; and it is probable that there are seasons of the year when lime is more usually burnt than at other times. It is said, that if the construction be correct, it will render the reservation in the previous part of the deed wholly inoperative: but that is not so; for by this covenant, the lessee is bound to furnish lime only for the use of the lessor and his *Staffordshire* tenants, and at the usual seasons. Now, it is very possible that he might want lime for the improvement of his adjoining estates in the next county, or he might want it not at the usual season, and in either of these cases the reservation would become necessary; or it might happen that after he had been once at the expense of erecting kilns for that purpose, he might choose not to purchase of the lessee, but to burn all his lime himself. I think, therefore, that the fair effect of the reservation was to give him this option; and that no valid argument can be deduced from it to shew that the defendant is not liable upon the present covenant.

HOLROYD J. I am of the same opinion. The covenant is not to be restrained by the reservation previously made in favour of the lessor; for that was only intended to give to him a more extensive right. If, indeed, it had been manifest in itself, or had appeared upon the record that there was no particular season for burning lime, it would have afforded a strong argument in favour of the defendant; for then it would, in fact, have been a covenant by the lessee to burn at all times and seasons when the lessor should please. But, for any thing that appears here, there may be particular seasons for burning lime; and in that case, there is no necessity for restraining this covenant.

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BEST J. If we were to decide against the plaintiff, we should not only violate the law, but do great injustice. The rent reserved is 10/.; and the lessor covenants that he will not take limestone for the purpose of burning it into lime for sale, even in his own inclosed lands. The great and only advantage, therefore, which he was to derive under this lease was, that he should have lime burnt for himself and his *Staffordshire* tenants at a given price. Both the parties contemplated that all the limestone should be burnt into lime, and not sold in its raw state. The words of the covenant seem to me to imply, that there are particular seasons for burning lime; but if that were not so, then they may be supposed to have been intended for the purpose of giving the tenant a reasonable excuse, if at any time from accidental circumstances he should be unable to burn lime, and to supply the lessor with it.

Judgment for Plaintiff.

Friday,
 May 7th.

WILLIAMS *against* SMITH.

Where the defendant, being indebted to the plaintiff, paid to him the debt in country bank notes on a *Friday*, several hours before the post went

ASSUMPSIT for money lent and advanced by the plaintiff to the defendant, and the other money counts. Plea, general issue. The cause came on for trial at the summer assizes 1817 for the county of *Berks*, when the jury found a verdict for the plaintiff out, and the plaintiff transmitted them partly by a coach on *Saturday* and partly by *Sunday* night's post, and both parts arrived in *London* on *Monday*, and were presented for payment and dishonoured on the *Tuesday*: Held that the true rule is, that a party, in order to avoid laches, must give notice by the *next day's post*, and not by the next possible post; and that the plaintiff, in so transmitting these notes, had been guilty of no laches, and might consider them as no payment, and recover for the original debt.

for

for the sum of 490*l.*, subject to the opinion of the Court upon the following case :

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The defendant, being previously indebted to the plaintiff in the sum of 500*l.*, on *Friday* the 8th of *December*, about nine or ten in the morning, at *Wantage* in *Berkshire*, where the plaintiff resides, paid to the plaintiff 490*l.* in notes of the *Newbury* old bank, and 10*l.* in a note of the *Wantage* bank, and the plaintiff gave him a receipt for the 500*l.*, on the back of the promissory note by which the sum was secured. The Plaintiff, on receiving these notes, instantly sent his son with 450*l.* worth of the *Newbury* notes to his bankers at the *Wantage* bank, with a direction to them to transmit the *Newbury* bank notes to *London*, to buy an exchequer bill : these were made payable on demand at the old bank, *Newbury*, and at the house of Messrs. *Barnard* and *Dimsdale*, *London*. *Wantage* is distant from *Newbury* eighteen miles, and it is a two-days' post from one place to the other. The post leaves *Wantage* for *London* at half-past five in the afternoon every day, except on *Saturdays*. The plaintiff's son took the above notes, amounting to 450*l.*, to the *Wantage* bank, requesting Mr. *Mattingley*, one of the partners, to send them to *London* ; but he said it would be dangerous, and therefore declined or refused to send them by the post on that evening to *London*, on account of the risk, which he did not choose to run ; but offered to inclose them on the *Saturday* evening in their packet, which they usually sent in the course of their business as bankers two or three times a week by the coach to *London*, and which packet, he said, would be in *London* on *Monday*. This proposal was, after some negotiation, ultimately acquiesced in ; and 450*l.* worth of the *Newbury*

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bury notes were carried to the *Wantage* bank, on *Saturday* evening, by plaintiff's son, and by the *Wantage* bankers then cut in halves, and one set of halves inclosed in the packet of the *Wantage* bank, and transmitted on the same evening to go to *London*. They usually send their notes half by the coach and half by the post. The other set of halves was sent by the post on *Sunday* evening. The halves sent by the post were addressed to Messrs. *Spooner* and *Attwood*, bankers in *London*, who were the correspondents of the *Wantage* bank. *Wantage* is distant from *London* sixty-three miles. The halves of the notes sent by the post arrived at *Spooner* and *Attwood's*, in *London*, between ten and eleven o'clock on the morning of *Monday* the 11th; and the packet containing the other halves was delivered to them somewhat later. The *Newbury* bank stopped payment on the *Monday* morning, and Messrs. *Barnard* and *Dimsdale* continued to pay all notes drawn by the *Newbury* old bank the whole of *Monday* the 11th, but not afterwards; and would have paid the notes in question, if they had been presented to them at any time on the said *Monday*. The notes in question were sent by *Spooner* and *Attwood* to *Barnard* and *Dimsdale* for payment, on *Tuesday* the 12th; but they were dishonoured. Notice of the *Newbury* bank having stopt payment was communicated to the plaintiff on the evening of *Monday*, and he thereupon sent his son to the defendant's house, and the son communicated the fact of such stoppage to the defendant's wife, at the house of the defendant, the defendant having gone to bed. The defendant, the same evening, said he would take the notes again and return them to a Mr. *Lovelock*, of whom he had taken them. On the *Saturday* following,

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the

the plaintiff's son again saw the defendant, who then refused to take the notes again, saying Mr. *Lovelock* had told him not to do so, as he would thereby make them his own.

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W. E. Taunton, for the plaintiff. The only point is, whether the plaintiff, who received these notes on the Friday morning, was guilty of any laches in not transmitting them to *London* by the *Friday's* post. If he had done so, they would have arrived at *Spooner* and *Attwood's* on the *Saturday*, and they might have obtained payment for them; but it is clear he was not bound to do this, and might wait till the *Saturday*, on which day they were sent. It is not necessary in giving notice of the dishonour of a bill of exchange, to write by the same day's post on which it happened: if it be done on the following day it is sufficient. Then, if so, the plaintiff has here been guilty of no laches; and this case falls within the rule laid down in *Puckford v. Maxwell*. (a)

Sir *W. Owen*, contra, contended that the plaintiff had made the notes his own by the laches of which he had been guilty. He was bound to have transmitted them to *London* by the *Friday's* post; for he received them early in the morning, and the post did not leave *Wantage* till late in the afternoon. It is laid down by Lord *Mansfield*, in *Tindall v. Brown* (b), and *Russel v. Langstaffe* (c), and in *Bayley* on Bills of Exchange, that the time limited is the next post. And the language also of Lord *Ellenborough*, and *Le Blanc J.*, in

(a) 6 T. R. 52.

(b) 1 T. R. 167.

(c) Dougl. 515.

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against
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Darbishire v. Parker (a), leads to the same conclusion. As to the case of *Fry v. Hill* (b), it is distinguishable upon the ground, that there the bill in question was payable after sight, but here the notes were payable on demand. Besides, in the present case, one set of halves was sent by the coach, and arrived two hours later than the post on the *Monday*. That, therefore, was like sending them by a private hand, and brings this case within *Darbishire v. Parker*, at all events. Then, if so, the plaintiff is not entitled to recover.

Taunton, in reply, was stopped by the Court.

ABBOTT C. J. It is of the greatest importance to commerce, that some plain and precise rule should be laid down, to guide persons in all cases, as to the time within which notices of the dishonour of bills must be given. That time I have always understood to be the departure of the post on the day following that in which the party receives the intelligence of the dishonour. And in that sense the passage cited from the very learned treatise on Bills of Exchange must be understood, as well as the judgment of Lord Mansfield in *Tindall v. Brown*. If, instead, of that rule, we were to say that the party must give notice by the next practicable post, we should raise in many cases difficult questions of fact, and should, according to the peculiar local situations of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated. In its application to the present case, the result is, that the plaintiff has been guilty of no laches,

(a) 6 East, 9.

(b) 7 Taunt. 397.

and

and that he is entitled to our judgment. It appears, that if these notes had been transmitted direct to *Newbury* by the post, they would not have been paid; for they discontinued payment there on *Monday* morning; and though the circumstance of one set of halves being sent by the coach, caused their arrival in *London* two hours later, still, that being a reasonable precaution, the plaintiff had a right to send them by that conveyance. There is a difference between this case and that of a bill of exchange, payable to order, for such bill may be specially endorsed, and no risk incurred by sending it then by the post. But here it would not have been so safe to have transmitted notes payable to the bearer on demand by that conveyance. Then, in addition to this, it appears that the defendant has not been in the least degree prejudiced by this mode of conveyance having been adopted. On the whole, therefore, the plaintiff is entitled to our judgment.

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 against
 SMITH.

Judgment for Plaintiff. (a)

(a) *Wright v. Shawcross*. — *Jones*, in the first four days of this term, moved for a rule nisi to set aside the verdict for the plaintiff in this case, which was tried before the Chief Justice of *Chester* at the last assizes there. He moved it on two grounds: first, That by laches the plaintiff had made the bill of exchange, which had been given in payment for the goods, for which the action was brought, his own. The bill had been drawn by *P. B.* on Messrs. *L. R.* and Co., and was dated 1st *January*, 1817. And it had been delivered without having been indorsed by defendant to plaintiff. It was presented for payment in *London* on the 3d *April*. On the 4th a letter was written by the plaintiff, informing him of it, which he received on the 6th *April*, being *Sunday*. On the *Tuesday* evening notice by the post was sent to the defendant. The Court held that the plaintiff was not bound to open the letter from *London* till the *Monday* morning, and that, taking him to have received notice of the dishonour at that time, he had done quite sufficient in transmitting it to the defendant by the next day's post; and that, therefore, he had been guilty of no laches whatsoever.

Jones then moved on another ground. On the trial the defendant offered in evidence the following paper in the plaintiff's hand-writing:

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“ Mr. Shawcross Dr. to James Wright,	
“ To different items, amounting in the whole to	66 <i>l</i> .
“ By cash towards above - - - -	19
	—
	47
“ September 6th, By cash towards - -	10
	—
	37
“ Cash bills 4 <i>l</i> . and 20 sacks at 1 <i>s</i> . each - -	5
	—
	32
	—

Leaving, ultimately, a balance of 32*l*. This was rejected, on the ground that it was a receipt, and requisite to be stamped by 55 G. 3. c. 184. sch. part 1. *Receipt*. It was now contended that this was only in the nature of an account, stated by the plaintiff against himself, and that if this required a stamp, all accounts current, &c. would equally require it; and the extent to which they might go was very great, for the omission will subject parties to heavy penalties. But,

Per Curiam. The evidence was properly rejected. It appears from the paper that the acknowledgments were made at successive times upon the payment of the money; and, therefore, under the general words used in the act of parliament they require to have been stamped. The case of an account current is different. There the sums stated to be received are not written in to the account at and upon the receipt of the money, but long after, and only amount to admissions of money received at an antecedent time, They, therefore, on both grounds, refused the rule.

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SAVILLE and Others, Assignees of GOOCH, a
Bankrupt, *against* CAMPION.

Friday,
May 7th.

DECLARATION in detinue for goods delivered by the bankrupt before his bankruptcy, to the defendant, to be re-delivered to the bankrupt upon request. Breach, that the defendant refused to re-deliver the same either to the bankrupt or his assignees. Plea, that the defendant was the owner of a ship called the *Hero*, of which one *Price* was the commander, and that before *Gooch* became a bankrupt, viz. on the 18th *November*, 1816, by a charter-party, made between the defendant of the one part, therein described as the owner of the *Hero*, of the burden of 415 tons, and the bankrupt of the other part, therein described as freighter of the said vessel, it was witnessed, that the owner, for the considerations therein mentioned, covenanted with the freighter, that the ship, being then tight, staunch, &c., the commander should immediately take on board his ship, in the port of *London*, from the freighter, all such goods as he might think fit to load, reserving sufficient room in the fore-castle and half-deck of the ship, for the stowage of their provisions and cables, the cargo not exceeding what she could reasonably carry beyond her stores, tackle, &c., and that having received the same on board the ship, should proceed to *Madeira*, where she was to receive from the freighter's agents

By charter-party it was covenanted that the owner should receive on board, in *London*, all such goods as the freighter thought fit to load, and should proceed thence with to *Madras*, and there, after delivering her outward cargo, receive from the freighter's agents a home-ward cargo, and deliver the same in *London*; and that all the cabins but one, which was reserved for the use of the captain, should be at the disposal of the freighter, who was to appoint a supercargo, to superintend the stowage of the goods. Freight to be paid at so much per ton on the register tonnage of the ship. The captain and crew were

employed and paid by the owner: Held that, there being no express words of demise of the ship itself in the charter-party, the freighter did not thereby become the owner for the voyage; but that the possession continued in the owner, and that he, therefore, had a lien upon the cargo for his freight.

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such other goods as they might think fit to load, and then to proceed to *Madras* and *Calcutta*, and there deliver the outward cargo, and after being refitted, should receive on board all such lawful goods as the freighter's agents might think fit to load, and should then proceed to *London*, and there deliver her homeward cargo, agreeably to bills of lading, and so complete the voyage. The charter-party contained the usual covenants, specifying the number of lay days, and a stipulation that the freighter should pay to the owner a given sum for every passenger carried in the ship; and that all the cabins of the ship, except *one* for the use of the captain, should be at the disposal, and for the benefit of the freighter, and that a supercargo, to be appointed by the freighter, should be conveyed out and home, and be found and provided with the ship's provisions. The charter-party then set out covenants from the freighter to load the ship at *London*, *Madeira*, and *Madras*, within the lay-days, &c., and then to pay to the owner for the freight or hire of the ship for the voyage, at and after the rate of 14*l.* sterling per ton upon the ship's registered tonnage, and 2*l.* 10*s.* per cent. primage on the amount of the freight, in lieu of port and pilotage charges; and that the freight and primage should be paid as follows, viz. 500*l.* to be paid in cash at the expiration of six months from the date of the charter-party, a moiety of the remainder to be paid by bills at two months after date from the day on which the ship should arrive in the *Thames*, on her return from her homeward voyage, and the residue by bills at four months' date from the same period. There was then a covenant with respect to demurrage, and also that the freighter should have liberty to appoint

one *James Gooch Thompson* to proceed out and home in the ship, and not only to act as supercargo, but to take upon him the authority of the said *John Price*, in the stowage of the cargo, which should be done under the entire direction of *James Gooch Thompson*; but that he should not in any other particular interfere with the duties of *Price* as captain of the ship. The plea then, after shewing performance of the charter-party, by the defendant, in the earlier part of the voyage, stated that the commander did receive at *Mádras*, from the freighter's agents, the said goods in the declaration mentioned, they being the goods and chattels of the bankrupt, and afterwards arrived therewith in the river *Thames*, and gave notice thereof to the freighter and his agents, and was ready and willing, and tendered and offered to the bankrupt and the plaintiffs, his assignees, to make a right and true delivery of the homeward cargo, agreeably to bills of lading, on payment of the freight in the charter-party mentioned. The plea then stated, that the bankrupt and his assignees did not, upon request, when the goods were so tendered and offered them, offer to pay one half of the remainder of the freight by bills at two months after date from the day on which the ship arrived, or by bills at four months from the same date, but have refused and neglected so to do. The plea then stated, that the commander and mariners on board the ship, during the voyage, were paid by the defendant. And therefore that he detained and does detain the goods and chattels until payments be made to him of the remainder of the freight, according to the form and effect of the charter-party, as it was lawful for him to do for the cause aforesaid. To this plea the plaintiff demurred generally, and the

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defendant joined in demurrer. The case was argued at the sittings at *Serjeants' Inn*, before this term, by

Gaselee, in support of the demurrer. The defendant (who is the actual permanent owner of the ship) had, by the charter-party, parted with the possession to the charterer, who thereby became the temporary owner: the defendant, therefore, has no lien for the freight, because he had not the possession of the ship and cargo when the freight accrued due. *Vallejo v. Wheeler* (a), and *The Trinity House v. Clark* (b), are authorities to shew, that the charterer for the voyage is to be considered the owner pro tempore. It is true, that here the charter-party does not contain the words "let to freight." That, however, is immaterial; for if, upon the whole of the instrument, it appears to be the intention, that the one should divest himself of the possession and the other come into it, that is substantially a letting to freight for the voyage. For that is sufficient to constitute a lease. *Bacon's Abridgm.* tit. *Leases*, K. *Cq. Litt.* 45. b. *Bro. Abr.* tit. *Leases*, 71. 4 *Inst.* 111. 112. Here the charterer was to have the entire use of the ship for the voyage, with the exception of one cabin, appropriated to the use of the captain who navigated the ship, which is the usual accommodation. The circumstance of the master and mariners being paid and employed by the defendant, makes no difference, *The Trinity House v. Clark*. *Hutton v. Bragg* (c) appears from the printed report to be precisely in point. It is true, that the charter-party there did actually contain the words "let to freight."

(a) *Cowp.* 143.(b) 4 *Maule & Selw.* 288.(c) 2 *Marsh.* 339.

That does not appear in the report, and the Court does not advert to those words in their judgment. The decision proceeds wholly on the ground that the owner had parted with the possession, and that the charterer had become owner for the voyage. Here, too, the freight reserved is in the nature of rent, being one entire sum for every ton of the registered tonnage of the ship, and not in proportion to the quantity of goods shipped on board, which shews that the entire thing was intended to be demised for the voyage. The mode of payment is likewise inconsistent with the right of lien, for the time when the bills were to become due might have expired before the goods could be landed.

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Campbell, contra. This dispute arises from the ambiguity of the expression, "to charter a ship," which may either mean a contract whereby the hull of the ship is let to hire like any other chattel, or a more contract to carry goods from port to port. In the former case, the possession passes to the hirer; in the latter, it remains with the owner. This charter-party is a mere contract to carry, and differs from a bill of lading only in extending to all the goods on board the ship. A ship so chartered differs from a general ship only in this, that the owner enters into a contract to carry with one individual instead of several. A bill of lading is a charter-party, as to so much of the ship as is occupied with the goods of the shipper. A charter-party like the present may be considered a bill of lading of the whole cargo. There is therefore no ground for saying that the owner did not remain in the possession of the ship. It is expressly averred in the plea, that he was in possession when the charter-party was executed.

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CAMPLING.

When was he divested of the possession? The master and mariners were his agents: he covenants to receive the goods and to deliver them. If he never was in possession of the goods so as to have a lien on them for freight, how does this action come to be brought against him for *detaining* them? According to the argument on the other side, in case of injury by collision, the action must be brought by the freighter, and not by the owner, the contrary of which has been expressly decided; and in case of deviation, the freighter's remedy against the owner would be, not covenant on the charter-party, but trover for the ship. So, a delivery of goods on board a chartered ship would be a delivery to the purchaser. But it has been held, that on board the chartered ship they are still in transitu, being in the possession of the ship-owner; and that on the insolvency of the purchaser, they may be stopped by the vendor. In *Vallejo v. Wheeler*, which has been so much relied upon, the charter-party is not set out; but it was clearly a letting to hire of the hull of the ship; for *Aston J.* says, "The hull of the ship belonged to *Willis*: but he had nothing to do with it, having chartered it to *Darwin*. The jury, therefore, did right to consider *Darwin* owner, *pro hac vice*;" and the whole Court take the distinction between a general letting to freight and a covenant to carry. *The Trinity House v. Clark* proceeded on the ground that the possession of the crown was indispensably necessary to carry into effect the purposes of the contract. *Paul v. Birch* is (a) an authority in favour of the defendant; for although the charterers had power to appoint the master and mariners, Lord *Hardwicke* decreed that the

(a) 2 Atk. 621.

owner had a lien to the amount of the freight due from the shippers of the goods. In *Frazer v. Marsh* (a), there was a lease of the hull of the ship for a certain number of voyages; and it was merely held that the registered owners were not liable for stores ordered for her by the freighter, while she was in his possession. In *M'Kenzie v. Rowe* (b), it may be collected that on proof of the goods having been received on board by an agent of the owner, he would have been held answerable. *Hutton v. Bragg*, as reported, caused great astonishment in *Westminster Hall*, and great confusion in the commercial world, and cannot be considered as law. Gibbs C. J. afterwards observed, that the Court imagined the charter-party (which was not set out in the special case) to have been the same as in *Vallejo v. Wheeler*, and that certainly transferred to the charterer the entire possession and management of the ship, with the appointment of the master and mariners; and, at any rate, the doctrine supposed to be laid down in *Hutton v. Bragg* has been overturned by the subsequent decisions of the Court of C. P., in *Tate v. Meek*, and *Yates v. Railton*. (c) Then, as to the objection, that the mode of payment provided for is inconsistent with the claim of lien, on inspecting the charter-party, it will be found that the delivery of the goods, and the payment of the freight, are concomitant acts, *Morton v. Lamb* (d), *Rawson v. Johnson*. (e) The delivery of the goods is to be purchased by the payment of the freight. Therefore, in an action on the charter-party for freight, it would be necessary to aver a readiness to deliver the goods; and in an action on the charter-party for not de-

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(a) 13 East, 238.

(b) 2 Campb. 482.

(c) These cases were argued either in *Easter* or *Trinity*, 1818, and are not yet reported.

(d) 7 Term Rep. 125.

(e) 1 East, 203.

livering

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livering the goods, it would be necessary to aver a readiness to pay the freight. But varying the remedy cannot vary the rights of the parties; and as there has been a refusal to pay the freight, this action of detinue cannot be maintained.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. This case was lately argued before us at *Serjeants' Inn*; and in support of the demurrer, it was contended, that this being a chartered ship, the charterer was to be considered as the owner for the voyage, according to the cases of *Vallejo v. Wheeler*, and the *Trinity House v. Clark*; and that, consequently, the merchant charterer, being the person in the possession of the ship, was also the person in possession of the goods on board the ship; and the defendant, who had thus parted with the possession to him, could not by law have a lien upon the goods, of which he never in law had the possession; and the case of *Hutton and Others v. Bragg* was referred to as an authority in point. It was observed, that although the charter-party in this case did not contain any terms of demise or letting to freight, as the instrument in the case of *Hutton and Others v. Bragg* was assumed to do, yet that it contained matter equivalent to such words; as a lease for years of a chattel real may be made without express words of demise, any words plainly shewing that the one party is to give up to the other, and the other to take and hold possession of the land for a definite time, being sufficient to constitute a lease. This latter proposition is undoubtedly true; but upon an attentive consideration of the charter-party in the present case, we find nothing either in its language or in its object, which

which imports that the merchant charterer was to have the possession of the ship. The whole instrument contains matter of contract and covenant only. At the making of the contract, the ship was under the government of *Price* the master, as the servant and agent of the defendant the owner, and so continued, in fact, during the whole voyage. By the instrument of contract, the owner covenants that the ship being tight and substantial, manned with twenty-four men and boys, and properly victualled, the said commander, or some other person in his stead, shall receive and take on board the goods of the freighter in *London*, and sail to *Madeira*, and receive and take on board other goods there; that from thence the ship shall proceed to *Madras* and *Calcutta*, and there the commander shall deliver the goods, and receive and take on board other goods; and then the ship shall proceed to *London*, and there the commander shall deliver the latter goods. The owner further agrees, that such passengers as may be required by the freighter shall be conveyed in the ship; and that all the cabins, except one, shall be for the benefit and at the disposal of the freighter. The freighter agrees to send goods alongside the ship, and to receive them from alongside; and there is a special clause providing that the freighter may appoint a person to go out and home as supercargo, and to take upon him the authority of the commander in the stowage of the cargo; but not to interfere with the duties of the commander in any other manner, without his leave. So that there is not any one act to be done on board the ship by the freighter or his agents, except the stowage of the goods, which is specially provided for; and this special provision, as well as the clause relating to

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to the cabins, would be unnecessary, if it had been intended that the freighter should have possession of the ship; because, in that event, he might stow and place goods and persons as and where he himself should choose, unless restrained by some special contract on his part. The terms of the charter-party in the case of *Vallejo v. Wheeler* are not very clearly shewn in the report of the case; but it has always been considered that the ship was thereby let to freight. In the case of the *Trinity House v. Clarke*, the deed was in that form; and in the judgment in that case, great reliance was placed on the objects and purpose, as well as on the terms of the deed; and the Court thought the nature of the service required that the crown should be considered as the temporary owner of the ship. The charter-party in the case of *Hutton and Bragg*, was also in terms of letting to hire. This does not distinctly appear by the report; but a copy of it was produced, and it was admitted to be so in the argument of the present cause. In the case now before the Court, the charter-party, as has been before observed, contains no such terms; nor does the nature of the service require that the merchant should be considered as temporary owner, in any question between him, or those who represent him, and the defendant. Upon this instrument, therefore, and between the parties to this suit, we think the defendant had the possession of the ship and goods for the voyage, and a lien on the goods for the stipulated hire of the ship, there being nothing to shew that the delivery of the goods was to precede the payment of that hire in cash and bills, as provided for by the deed. And our judgment, in this case, will be conformable to that of the Court of Common Pleas in the case of *Tate v. Merck*,
and

and to the principle upon which the judgment of this Court in the case of *Bohtlingk v. Inglis* (a) was founded; and also agreeable to the nature of the contract that a prudent ship-owner would make on such an occasion. For it would certainly be an act of imprudence, on the part of a ship-owner, to enter into a contract which might have the effect of employing his ship for a long time, and at a great expense to himself, without any remuneration, if the person with whom he contracted should happen to fail before the termination of the voyage.

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 against
 CAMPION.

Judgment for the Defendant.

(a) 3 East, 384.

THORNELY and Another *against* HEBSON.Friday,
May 7th.

ACTION on a policy of insurance, effected in the names of the plaintiffs, as agents upon the ship *William*, valued at 1200*l.*, from *Hull* to *New York*, subscribed by the defendant, on the 16th *November*, 1816, for 200*l.*, at five guineas per cent.; the interest was averred to be in *Townsend and White*, and the loss by perils of the seas. The defendant pleaded the general issue, and the cause was tried before Lord *Ellenborough* C. J. at the *London* sittings after *Michaelmas* term, 1817, when a verdict was found for the plaintiff,

A ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas for the mere preservation of their lives; and the ship was then taken possession of by a fresh crew, who succeeded in

conducting her safely into port: Held that such desertion of the crew did not of itself amount to a total loss; and, secondly,

That the ship having been sold under the decree of the Admiralty Court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, that they had no right to abandon, and that there was no more than a partial loss.

damages

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against
HERSON.

damages 200*l.*, subject to the opinion of the Court, on the following case.

The plaintiffs as agents of *Townsend* and *White*, merchants in *New York*, effected the policy in question, on the ship valued as aforesaid at 1200*l.*, which was subscribed by the defendant, for the sum of 200*l.*, and *Townsend* and *White* were interested in the ship to the valued amount. The ship, properly manned and equipped, sailed soon afterwards in ballast, on the voyage, insured; after leaving *Hull* she struck on a sand-bank, and put into *Dover* to be repaired; sailed from *Dover* on the 19th of *December*, 1816, and proceeded on her voyage. Nothing of much importance occurred after the vessel left *Dover*, except the continual succession of heavy gales from the westward, the ship straining and making much water, until the 14th *February*, 1817, when, it blowing a very severe and heavy gale from the south-west, it was discovered, that the vessel's mainmast was badly sprung. The gale continued on the 15th, when the fore-yard and fore-sail were carried away, and the fore-topsail was torn to pieces by the gale, and the bowsprit was discovered to be badly sprung. During these days, and until the crew left her, she leaked so much as to require one pump to be constantly going; and, owing to the injury which the vessel had sustained by the seas and tempest during the said voyage, and to the fatigue which the crew had consequently undergone, the crew were no longer able to navigate her. On the 16th of *February*, 1817, the crew of the *William* discovered two vessels, and made a signal of distress. In a few hours the two vessels bore down to the *William*, and proved to be two brigs, one called the *Hyder Ali*, and the other the *Navi-*

Navigator. The masters of both the brigs promised to keep by the *William* till the ensuing morning; and then each of them take on board of their respective ships one half of the crew; but, during the night, a heavy gale separated the *William* from the *Navigator*. On the 17th *February*, the brig *Hyder Ali* was still in sight of the *William*, and the crew of the *William* went on board the *Hyder Ali*; but, in consequence of the heavy seas then running, they were only able to remove from the *William* their provision and clothes; and when the crew left the *William*, they were so worn out with fatigue, that they could not be mustered on deck to the pumps, or to make what sail then remained. The crew of the *William* so left her, upon the unanimous opinion of the whole crew, after a consultation amongst the master, mate, and mariners, and for the preservation of their lives. Notwithstanding the state of the *William*, and the continued violence of the weather, eight fresh men from the *Hyder Ali* (which said brig had many *American* seamen passengers on board) volunteered to go on board of the *William*, in the hope, at the risk of their lives, of bringing her into port; and the said men were permitted by the captain of the *Hyder Ali* to go on board of her, and the two vessels shortly afterwards separated. The *Hyder Ali* arrived at *New York* with the late crew of the *William* on the 4th *March*, and then (the ultimate fate of the *William* being unknown) the particulars of her misfortunes, as hereinbefore related, were communicated to Messrs. *Townsend* and *White*. They, on the 8th of *March*, (being the first opportunity of sending a letter to *Liverpool*, after the arrival of the *Hyder Ali* at *New York*,) wrote to the plaintiffs, their agents at *Liverpool*, direct-

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directing an abandonment to be made to the underwriters of the vessel, and this letter was received by the plaintiffs in *Liverpool* on the 17th *April*. On the 18th *April*, in pursuance of these directions, the plaintiffs gave notice of abandonment to the defendant; but the defendant refused to accept it, as intelligence had arrived in *England* (as the fact was) that the men from the *Hyder Ali* had succeeded in bringing the *William* into *Newport*, a port in *Rhode Island*, about 200 miles from *New York*, and from whence, had she been refitted and repaired, she might easily have proceeded to *New York*, independent of the proceedings in the Admiralty Court after mentioned, but where she lay, with the knowledge of the said *Townsend* and *White*, subject to a claim for salvage. The *William* arrived at *Newport* on the 10th *March*, 1817, and was immediately libelled by the salvors in *Rhode Island*, in the Admiralty Court, for salvage, and being claimed by the late master, professing to act on behalf of the underwriters, but not having their particular authority, and which claim was known to *Townsend* and *White*, the Court decreed her to be sold, and one half of the proceeds to be paid to the salvors, with costs; and she was accordingly sold for 315*l.*, and the salvors were paid thereout the amount decreed to them, and costs, and the balance (about 112*l.* 10*s.*) now remains in the Court. The present action was commenced on the 19th *November*, 1817: previously thereto, the defendant had paid the plaintiffs the partial loss.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover for a total loss. If the Court should be of that opinion, then a verdict was to be entered for 200*l.*, from which, by
agrec-

agreement, the plaintiffs will deduct the sum already paid. If the Court shall be of opinion that the plaintiffs are only entitled to a partial loss, then a nonsuit was to be entered.

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Parke, for the plaintiff. This was a total loss at the time when the crew, with a view to the preservation of their lives, abandoned the ship: the owners never afterwards obtained the beneficial use of the vessel. It is true, that another crew then went on board; but they were not the servants of the assured: their possession was not the possession of the assured. Their only object in saving the vessel was the prospect of salvage; and they had the entire dominion of the ship until she arrived at *Rhode Island*. The property was then libelled in the admiralty court, and at length decreed to be sold; so that from the moment of the desertion, the owners lost the beneficial use of the vessel, which has never since been restored to them: they therefore had a right to abandon. Here, too, the salvage was high, being half the value at *Rhode Island*; and that of itself forms a ground of abandonment, according to Lord *Mansfield* in *Goss v. Withers*. (a) This differs from *Bainbridge v. Neilson* (b); for there the ship ultimately came to the possession of the owners. The authority of that case, however, as well as that of *Falkner v. Ritchie* (c), is considerably shaken by what fell from Lord *Eldon* in *Smith v. Robertson*. (d)

Littledale, contra, was stopped by the Court.

ABBOTT C. J. It appears to me that there was not a total loss, at any period, until the assured allowed the

(a) 2 Burr. 697.

(b) 10 East, 329.

(c) 2 M. & S. 290.

(d) 2 Dow. 474.

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THORNTON
against
HARRISON.

ship to be sold under the decree of the admiralty court at *Rhode Island*, which they might have prevented; and it certainly was their duty to have prevented the loss of the ship, by raising money and paying the salvage. If we held that the assured were entitled to recover in this case, the underwriters would be charged with a burden which is not within the terms of their contract. In the case of *Goss v. Withers (a)*, there is an expression used by Lord *Mansfield* which is certainly too general: he says, that the right which an owner has to obtain restitution of the ship and cargo, paying great salvage, may be abandoned to the insurers. Now, that must mean such salvage as the assured has no reasonable means of paying. If, in this case, it had appeared that the owners had used all the means in their power, and were still unable to have paid this salvage, it would have been very different; but that is not so, and I am therefore of opinion that the assured is not entitled to recover for a total loss.

BAYLEY J. I am of the same opinion. The plaintiff relies upon two circumstances in order to constitute this a total loss: the first is the desertion of the ship by the crew, and the second the sale at *Rhode Island*. Now, where a ship is captured, she is taken possession of by persons *adversely* to the owner, and so it is in the case of barratry; but here the ship was taken possession of by persons acting, not adversely, but for the joint benefit of themselves and the owners; and the latter were never dispossessed of the vessel. The desertion of the crew, therefore, does not amount to a total loss. Then, as to the second point, the sale, in order to con-

(a) 2 Burr. 697.

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stitute a total loss, must have been found to have been necessary, and wholly without the fault of the owners. Now, here a ship originally worth 1200*l.* is sold for 315*l.* only. It appears that the owners were near enough to have acted in the business at the time. If they had exerted themselves, and were unable to raise money, in order to release the ship and put her into a proper state of repair, the sale might have been necessary; but in the absence of any proof of such exertion, I cannot say that I think it was so. It is a very beneficial rule, and consistent with the meaning of the policy, for the Court to say that the assured cannot abandon so as to make it a total loss, unless they have exerted the utmost of their power to prevent the necessity for it. On both grounds, therefore, I am of opinion that there must be judgment for the defendant.

HOLROYD J. I am of the same opinion. The desertion of the ship by the crew does not of itself constitute a total loss; and the subsequent taking possession by the salvors was not adverse, but an act done for the benefit of the owners, and therefore did not dispossess them. The custody of the vessel was in the salvors till the salvage was paid; but the legal possession was still in the owners. I think, also, that the sale will not amount to a total loss, so as to entitle the assured to recover, if it was in their power to have prevented it; and it lies upon them to shew that they could not do so. As they have not done that in this case, I think that this does not appear to have been a necessary sale of the vessel, and that the plaintiff is not entitled to recover.

BEST J. concurred.

Judgment of nonsuit.

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THORNELY
against
HARRIS.

1819.

Saturday,
May 8th.

The KING against The Inhabitants of TURVEY.

A pauper was hired for a year from Old Michaelmas, to go away a month at harvest, and to make up the time after Michaelmas:

Held that this was not a hiring for a year, and no settlement was thereby gained.

THOMAS SMITH and his family were removed, by an order of two justices, from *Stanwick*, in the county of *Northampton*, to *Turvey*, in the county of *Bedford*. On appeal, the sessions confirmed the order, subject to the opinion of this Court, on the following case.

The pauper, being legally settled at *Turvey*, by hiring and service, was afterwards hired by *William Bayes*, of *Stanwick*. The terms of the hiring were a year, from Old Michaelmas; to go away a month at harvest, and make the time after Michaelmas. He went away for a month at harvest, and continued in his master's service a month after Michaelmas. The whole service was performed at *Stanwick*.

Holbeck and *Adams*, in support of the order of sessions. This is not a hiring for a year, for the party was not bound to stay for a consecutive year from any period. And *R. v. Rushulme* (a), and *R. v. Buckland* (b), are authorities to shew this. In the former, it was a hiring for four years, with liberty to be absent a week in each year; and in the latter, the party was hired to work only shearman's hours. The case of *R. v. Winchcomb* (c) is distinguishable: there the law made the exception, and not the parties; and nothing turned in that case on the additional service at the end of the year. And they cited also *R. v. Over*. (d)

(a) 10 East, 325.

(c) Dougl. 391.

(b) Burr. S. C. 694.

(d) 1 East, 599.

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Marriott and *Dwarrris*, *contra*. Here the party is bound to serve for twelve months altogether. And *R. v. Milwich* (a) decided, that a hiring for eleven months and one month, was a hiring for a year. Here it is a hiring for thirteen months, subtracting one month. This, therefore, as much as the other, is a substantial compliance with the statute. In *R. v. Rushulme*, the exception was made without an equivalent. Here the party stipulates, that he will serve a period exactly of the same length as the excepted one. And the whole is done by one agreement.

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The King
against
The Inhabit-
ants of
Turvey.

ABBOTT C. J. It has been decided in this court, that where there has been a hiring for a year, and a service for a year, although that service has not been under one hiring, the servant gains a settlement. But I hope no rash genius will ever carry the matter any further. The only question here is, what is the meaning of the word “year” in this statute. I apprehend the legislature most clearly to have meant, one entire consecutive period of 365 days. Unless that were so, we might have to deduce a settlement of a pauper, by taking different unconnected days and weeks from a long series of years, so as to make up in the whole a year’s service. And so it would happen that a hiring for the month of *August*, for this and eleven successive years, would amount to a hiring for one year. I have often lamented, that in so many instances, the Court has departed from the plain and literal construction of the statutes relating to the settlement of the poor. As far as the authorities go, I have always held, and shall always continue to hold myself bound; but, where they

(a) 2 *Bolt*, 210.

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against
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ants of
TUNNEY.

are silent, I shall feel myself bound to construe these acts of parliament according to the plain and popular meaning of their words. For these reasons I am of opinion, that this order of sessions should be confirmed.

BAYLEY J. The cases of *R. v. Buckland*, and *R. v. Rushulme*, are in point, and the latter is much stronger than the present. For there, though there was a hiring, which was to last in the whole for four years, yet, there being no stipulation for a service for any one consecutive year, the Court held that no settlement was gained.

HOLROYD J. concurred.

Order of Sessions confirmed. (a)

(a) *Best J.* was in the Bell Court.

Saturday,
May 8th.

The KING against BIRD and Others.

The expenses of a constable, in prosecuting an assault committed on him in the execution of his duty, cannot be paid by the overseer out of the poor-rate, and are not within the 19 G. 3. c. 19. s. 4.: Held, also, that where the appeal is against the overseers'

accounts by individuals paying rates within the parish, the certiorari is not taken away by 50 G. 3. c. 49.; that act only applying to appeals by the overseers against the disallowance of any items in their accounts by the magistrates.

THE sessions, upon appeal, confirmed the allowance by two justices of the accounts of *William Kirby*, one of the overseers of the poor of the hamlet of *Lower Milton*, subject to the following case: — In *May*, 1817, *Mary Jones*, a pauper of *Lower Milton*, applied to *William Kirby*, the overseer, for relief; and on that occasion, as well as former occasions, conducted herself in a violent and clamorous manner; and having entered *Mr. Kirby's* shop, and refused to leave it, and a consider-

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able mob having collected, and being very clamorous, he ordered *William Partridge*, a constable of the said hamlet, to take her into custody. *William Bird*, one of the appellants, interfering on that occasion in behalf of *Mary Jones*, an information was laid against him before a magistrate, who directed the constable to prosecute *Bird* at the sessions for an assault and rescue; and bound the constable over in 50*l.* to prosecute, and *Kirby* in 30*l.* to give evidence. *Bird* was accordingly indicted at the *Michaelmas* sessions, 1817, for an assault and rescue, and acquitted by the jury; but the court expressed their approbation of the conduct of the overseer, and, in particular, said he had done his duty in preferring the indictment. The first item appealed against, of 4*l.* 12*s.* 8*d.*, was paid for the expenses of the constable and witnesses in attending to prefer the bill of indictment against *Bird*; the second item, of 26*l.* 2*s.* 4*d.*, was the amount of the attorney's bill for conducting the prosecution; and the last item, of 4*l.* 19*s.* 4*d.*, was paid for the expenses of the constable and witnesses in attending the trial of the indictment. No meeting of the inhabitants of the hamlet was called to consider of the propriety of prosecuting *Bird*; but *Kirby* informed many of them of such prosecution being about to be commenced. The accounts of the overseers of the hamlet are allowed, and the allowance entered into a book kept for that purpose, at a meeting of the inhabitants which is called for that purpose, and a monthly notice given in the chapel, which notice merely desires the inhabitants to attend to allow the overseers' accounts, without specifying the nature of the accounts to be allowed. At a meeting called on the 3d of *August*, 1817, the first item, of 4*l.* 12*s.* 8*d.*, was allowed, and the allow-

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The *Kent*
against
Bird.

1819.

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The King
against
Brab.

ance signed by three of the inhabitants. At a similar meeting held on the 19th *March*, 1818, sixteen of the inhabitants attended, nine of whom signed an order for payment of the sum of 26*l.* 2*s.* 4*d.*: two of them only objected to the payment, namely *Bird* and another, who refused to sign. At a similar meeting held on the 2d *April*, 1818, the last item, of 4*l.* 19*s.* 4*d.*, was allowed, and the allowance signed by three of the inhabitants. A vestry meeting was held on the 5th of *April*, 1818, called by notice in the chapel, to pass the overseers' accounts generally for the whole year. At this meeting, the accounts containing the items in question were produced and allowed, and the allowance signed by four inhabitants, being all that attended. When this case was called on,

Gurney first objected that the order of sessions had been improperly removed, as the certiorari was taken away by 50 G. 3. c. 49. That act, after giving power to two justices at a special sessions, to examine and allow, or disallow the overseers' accounts, enacts, by s. 5., "That no certiorari shall be granted to remove any order or proceeding of any general or quarter sessions, or of any justices made or had under this act, into any superior court of record; but that all orders and proceedings of such sessions, subject to such appeal as aforesaid, under this act, shall be final and conclusive to all intents and purposes." The object of the act was to prevent any order of sessions from being brought up.

Russell, contra, contended that this order of sessions was not made under 50 G. 3. c. 49., but under 17 G. 2. c. 38. s. 4., which regulates appeals brought against
over-

overseers' accounts by the parishioners. The 50 G. 3. c. 49. only applies to appeals brought by churchwardens and overseers; leaving appeals by other persons as they before stood under the prior act. The Court were of this opinion, and called upon the other side to proceed to support the order of sessions.

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Brid.

Gurney and *West* then contended, that these were sums necessarily expended by the overseer in the execution of his office: he was obliged to institute the prosecution for his own protection. The prosecution was directed by a magistrate; and although the defendant was acquitted, the conduct of the overseer was approved of by the court before which the indictment was tried. No positive statute is necessary to enable an overseer to retain sums he has been forced to expend in the discharge of his duty. He has been held entitled to charge the parish with the expense of prosecuting appeals against orders of removal, although no statute authorises him to do so, *Rex v. Inhabitants of Essex* (a). But these sums may also be considered as charges which the constable is entitled to make by 18 G. 3. c. 17. s. 4., for doing the business of his township. It is true, that act appoints a certain mode of making out the constables' accounts, which has not been followed in this case; but the directions of the act are not conditions precedent to the constable's right to recover the money he has expended; and besides, those directions are for the benefit of the parish, they are entitled to wave them if they think fit; and the subsequent approbation of the overseers' accounts, is a waiver in this case of the formalities prescribed by the act.

(a) 4 T. R. 594.

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The King
against
Brad.

The Court were of opinion that these sums of money could not be charged by the overseer upon the parish, as expenses incurred by him in the execution of his office, and directed the counsel on the other side to confine themselves to the latter point.

Russell and Shutt contended, that these items could not be considered as sums expended by the constable in doing the business of his township. The constable here was not employed by the parish; but, as in other common cases, by the person instituting the prosecution. Besides, this is not a charge contemplated by the act; for the 13 and 14 *Car. 2. c. 12. s. 18.*, which is in pari materia with 18 *G. 3. c. 19. s. 4.*, defines the nature of the charges which the constable is entitled to make, viz. for relieving, conveying with passes, and carrying rogues, vagabonds, and sturdy beggars, to houses of correction, &c. But it is sufficient, in this case, to say that the constable has not pursued the directions of the 18 *G. 3. c. 19. s. 4.* By that act, the constable is to return his account of sums expended on account of the parish to the overseer every three months, who is to call a meeting of the inhabitants for the express purpose of examining the accounts, neither of which have been done here. The provisions are not mere formalities, as contended on the other side; but are introduced for the protection of the parish, and ought to be strictly observed.

They were then stopped by the Court, who said, that the expenses of the constable, which were to be allowed him by the parish, were those necessarily incurred by him on behalf of his parish, which these were not.

Order of sessions quashed.

1819.

The KING *against* The Inhabitants of STAPLE-
GROVE.

Monday,
May 10th.

UPON an appeal against an order of two justices, for the removal of *Richard Wood*, his wife and child, from the parish of *Creech St. Michael*, in the county of *Somerset*, to the parish of *Staplegrove*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper, *Richard Wood* the elder, having gained a settlement in the parish of *Staplegrove* by a yearly hiring and service there, afterwards, about thirty years ago, married *Michell* the daughter of *John Fouracre*, his present wife. *Fouracre*, at that time, was seised in fee of, and lived in a freehold cottage and garden in, the parish of *Creech St. Michael*. Having afterwards become a burthen to that parish, on the 10th *June*, 1793, an indenture of that date was made between *Fouracre*, of the one part, and the four churchwardens and overseers of the said parish, *John Gill* being one, of the other part, by which indenture *Fouracre*, for and in consideration of divers and sundry sums of money which he had already had and received of the said churchwardens and overseers, and of the convenient and necessary sums which he must in future receive from them or from their successors, as also for and in consideration of the sum of five shillings, of lawful money of *Great Britain*, to the said *John Fouracre*, in hand well and truly paid, at and before the sealing and delivery of that indenture, the receipt whereof he the said *John Fouracre* did thereby, and by a receipt there-

J. F., being seised in fee of a cottage, demised the same to the overseers of the poor for 1000 years, reserving a pepper-corn rent, and continued to reside there. Being sick, his daughter and her husband came, by permission of the parish officers, to reside with and take care of him: after his death, the daughter being his heir, they continued to reside there above 40 days, claiming a right to the possession: Held that they thereby gained a settlement, being entitled to the reversion, and the residence not being fraudulent.

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thereon indorsed, own and acknowledge, and for other good causes and valuable considerations, him the said *John Fouracre* thereunto specially moving, did grant, bargain, sell, and demise unto them the said churchwardens and overseers, and their respective successors, the cottage and garden above mentioned, with the appurtenances; to have and to hold the same unto them and their successors for the time being from the making thereof, for and during the term of 1000 years, without impeachment of waste, at the yearly rent of one pepper-corn, under the usual covenants made to and with them and their successors, or succeeding churchwardens and overseers, for the time being. It appeared in evidence, that *Fouracre*, the grantor, had, some little time prior to the execution of the lease in question, offered to sell the cottage and garden to the overseers, but it did not appear for what consideration. That the deed was read over to him before he executed it, which he did voluntarily and without coercion. That he soon after left the cottage, and did not return to it again until a short time previous to his death, which happened in the year 1813, when he was again placed in it, with another pauper, by the overseers of the poor. During all this interval, the cottage had been occupied by paupers, placed there by the overseers of the poor. Soon after *Fouracre's* return, his daughter, the pauper's wife, came, by the permission of the overseers, to take care of her father, who was at that time very ill, and remained there at and after the time of his death. About six weeks after this event, the pauper, *Richard Wood*, joined his wife, and then, as *Fouracre* had died intestate, laid claim to the cottage as the property of his wife. The overseers having mislaid the deed above referred

ferred to, and consequently being then unable to substantiate their claim to the cottage, the pauper and his family continued to reside there until the date of the order appealed against; but the deed having been then recently found, the pauper and his family, who had become chargeable to the parish, were removed under the above order of the magistrates, from the cottage alluded to, to the parish of *Staplegrove*. Three of the original lessees have been long dead, and *John Gill* is the sole survivor. The question for the opinion of the Court was, whether the pauper gained a settlement by estate, in right of his wife, by residing more than forty days in the cottage in question, under the circumstances above stated. The case was argued in last term by

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Moore and *Erskine*, in support of the order of sessions. They contended, that there was not a sufficient residence in this case to gain a settlement. Here, the only interest which the pauper could possibly have was in the reversion to this estate after a lapse of 1000 years. Now there could be no reason why a reversioner should reside to superintend so remote an interest. And it is put by *Lawrence J.* as a question of doubt, in *Rex v. Houghton-le-Spring (a)*, and though the judgment of the Court was afterwards against his first impression, yet it does not appear that he ever altered his opinion on this particular point. This is like the case of *Rex v. Catherington (b)*: there the pauper, who was entitled to the equity of redemption, resided, for a particular purpose, in one of the houses mortgaged, and gained no settlement. And *Rex v. Eatington (c)* is also in point.

(a) 1 *East*, 257.(b) 3 *T. R.* 771.(c) 4 *T. R.* 177.

Besides,

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Besides, the possession of the pauper was wrongful: she was let in by the parish officers, to nurse her father, and then laid claim to the property. On this ground, therefore, her residence was insufficient. *Rex v. St. Michael's, Bath.* (a)

Gaselee, C. F. Williams, and Adam, contra. This case is governed by *Rex v. Houghton-le-Spring*. (b) The rule is, where a party has an estate, and resides in the parish forty days, a settlement is gained by such residence; and, whether the estate be large or small, or expectant after one year or 1000 years, makes no difference. Here, the estate might come into possession before a thousand years, if any forfeiture took place: and a pauper has a right to reside, to watch his own interest. The case of *Rex v. Houghton-le-Spring* was of a reversioner, for the property was in mortgage at the time. And *Lawrence J.* afterwards agreed, that his first opinion was not right. And in that case the two cases of *Rex v. Eatington* and *Rex v. Catherington* were cited, and considered not in point. *Rex v. St. Michael's, Bath*, is also distinguishable in two respects: first, there was a conveyance of the whole estate; and, as Lord *Mansfield* said, he had only a chance of the residue; and, secondly, there was also fraud. Both these are wanting in the present case.

Cur. adv. vult.

BAYLEY J. now delivered the opinion of the Court. In this case, which was argued last term, in the absence of my Lord C. J., there were two questions; one, whether forty days' residence in a parish, in which the

(a) 2 *Dougl.* 630.

(b) 1 *East*, 254.

pauper

pauper had a freehold, subject to a lease for years, would be sufficient to confer a settlement by estate; and the other, whether it would be so, if the residence were upon that estate, and without right. At the time of the argument, the first point appeared to us to be settled, especially by the case of *Rex v. Houghton-le Spring*, which establishes that such residence is sufficient; and it was upon the second point only, that we wished for time to consider. Upon that point the facts are these. The father of the pauper's wife had a freehold cottage in *Creech St. Michael*: in 1793, he let it to the parish officers, and their successors, for 1000 years, and they took possession. In 1813, he was placed in it, with another pauper, by the parish officers, and the pauper's wife came to nurse him. He died there in the same year, and his daughter continued in the cottage; and, at the end of about six weeks, her husband, the pauper, joined his wife, and laid claim to the cottage, as his wife's property. The parish officer had mislaid the conveyance to them, and, therefore could not withstand this claim, and the pauper and his family continued their residence from 1813 to 1818, when the pauper having become chargeable, and the parish officers having recently found their conveyance, the removal in question was made; and the point submitted to our consideration, by the sessions, is this, whether the pauper gained a settlement by this residence. And we are of opinion that he did. The sessions have found no fraud in the pauper or his wife, in acquiring or retaining possession; and, if we were at liberty to infer fraud, which we are not, there are no premises in the case from which such an inference could properly be drawn. The husband comes to the cot-
tage

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tage under a claim of right; and, for any thing which appears, he might really believe he had that right. The parish officers, who alone could gainsay that right, do not gainsay it, nor take any steps to oppose his occupation, but acquiesce in it for a period of more than four years. There is no decision, under circumstances in any respect like the present; for the cases cited of *Rex v. St. Michael's, Bath*, and *Rex v. Catherington*, were cases where the pauper had nothing in the parish which he had a colour for calling his own; and if not, we must look to the words of the statute, which give the right of removal, that we may see whether this case is within the mischief against which that statute meant to provide. That statute is 13 and 14 *Car. 2. c. 12*. And it recites that poor people are not restrained from going from one parish to another, and, therefore, do endeavour to settle themselves where there is the best stock, the largest commons or wastes to build cottages, and the most woods to burn and destroy, and when they have consumed it, then to another parish, and, at last, become rogues and vagabonds. And then it enacts that the justices may remove such persons to the parish where they were last legally settled, either as a native, householder, sojourner, apprentice, or servant, for the space of forty days, at least. Is, then, this pauper within the words, the spirit, or the mischief of this provision? He comes to *Creech*, not for any of the motives this statute meant to repress, but because he has a freehold in the parish; not to prey upon the parish stock, but to live upon that of which he is the freeholder, and as to which he was warranted in concluding that he was entitled to the possession. This is not a case of fraud, nor a case in which
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the pauper is conscious at the time, that he is taking the possession wrongfully, nor a case in which the person entitled to the possession takes prompt measures to displace him. Leaving such cases to be decided when they may arise, it is sufficient for us to say, that in this case, where there does not appear to have been fraud or consciousness of wrong, and where no measures were taken, within the forty days or afterwards, to dispute the pauper's occupation, we are of opinion, that this residence was sufficient, and that the orders, which proceeded upon the ground that it was not, ought to be quashed.

Both Orders quashed.

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STAPLEGROVE.

The KING *against* AMOS.

Monday,
May 10th.

INDICTMENT against the defendant, as the governor of the house of correction of the county of *Lancaster*, situate at *Liverpool*, in the said county, for a misdemeanor, for refusing to deliver up to *Thomas Rowe*, one of the constables of the said borough of *Liverpool*, pursuant to an order of the court of quarter sessions of the said borough, then sitting, one *James Crookham*, then in the defendant's custody in the said house of correction, for the purpose of the said *James Crookham* being conveyed by the said *Thomas Rowe* to the said court of quarter sessions of the said borough,

The 15 G. 2. c. 24. is a declaratory act, and should have a liberal construction. And, therefore, where justices of a borough, contributory to the county rate, have committed prisoners to the county house of correction for offences cognizable within the county, the justices, at their borough

sessions, have a right to order such prisoners to be brought before them for trial there. Quære, also, where a county magistrate, having concurrent jurisdiction, has committed a prisoner for an offence within the borough, whether the borough sessions have not the same power of ordering such prisoner to be brought before them for trial.

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there to take his trial upon a bill of indictment of felony found against him. The indictment came on for trial before *Bayley J.* at the last *Lancaster* summer assizes, 1818, when a verdict was taken for the crown, subject to the opinion of the Court on a special case.

There are two houses of correction in and for the county of *Lancaster*, one being the house of correction situate within the borough of *Liverpool*, and mentioned in the indictment, which is a part of the present gaol of the said borough, properly separated therefrom, but hired as a house of correction by the justices of the peace of the county, under the authority of the several acts of parliament in force; and another situate at *Preston*, in the said county. The expenses of which houses of correction are defrayed by a rate upon the county of *Lancaster*, exclusive of the hundred of *Salford*. And there is a third house of correction, situate at *Salford*, which was built, and is supported by a rate upon the hundred of *Salford* only. On the 5th day of *July*, 1817, *James Crookham* was apprehended within the borough of *Liverpool*, for a felony committed within the said borough, being the felony charged in the indictment; and sent for such offence to the house of correction for the county of *Lancaster*, at *Liverpool*, under a warrant of commitment by *John Wright*, Esq., one of the justices of the peace for the said borough, and received by the defendant into his custody, under the said warrant of commitment, to be kept in the said house of correction until the next general quarter sessions of the peace to be held for the borough. And the prosecutor and his witnesses were, in due form of law, severally bound over in the usual way, by the said justice, to appear at the general quarter

quarter sessions to be held for the borough, and prefer a bill of indictment, and give evidence against the said *James Crookham*. A general court of quarter sessions for the borough was held on the 21st day of *July*, 1817; and the prosecutor and his witnesses, in compliance with their recognizance, did appear at such sessions; and a bill of indictment was presented against the said *James Crookham* for the said felony to the jury, then impannelled and sworn, and returned to the said Court a true bill. The order of sessions mentioned in the indictment was thereupon made and shewn to the defendant, and he was required to deliver up the said *James Crookham* to *Thomas Rowe*, one of the constables of the said borough, for the purpose of his being conveyed by the said *Thomas Rowe* to the court of quarter sessions, and there tried upon the bill of indictment found. The defendant refused to deliver up the said *James Crookham*, as stated in the said indictment. The said *James Crookham* was afterwards detained by the defendant in his custody, until the next court of quarter sessions held for the said county of *Lancaster*, on the 11th *August*, and then discharged by proclamation, without having been tried for the felony for which he was so committed, no one appearing at such court of quarter sessions to prosecute him for the offence for which he was committed. The borough of *Liverppol* is a town corporate by prescription, and lawfully hath, and before, and at the time of committing of the said felony, had justices assigned to keep the peace in and for the said borough, and also to hear and determine divers felonies, trespasses, and other misdemeanours there committed; and general courts of quarter sessions of the peace have been immemorially held there, at which persons

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charged with petty larceny and misdemeanours, committed within the borough, have been tried. A court for the trial of civil actions, denominated the Mayor's Court, hath been immemorially held within the said borough; and there hath been immemorially a gaol within the said borough for the confinement of debtors under mesne process, and in execution for the said mayor's court; and also for the confinement of prisoners committed for trial by the justices of the said borough for offences done within the said borough, and also in execution of their sentences after trial at the said courts of quarter sessions; and the said gaol hath been, and still is, supported out of the funds of the corporation. The parish of *Liverpool*, which was formerly a township and part of the parish of *Walton*, and which was separated therefrom and made a parish of itself, by a certain act of parliament passed in the year 1669, pays its proportion of the county-rate, including therein such part of the same as is applicable to the maintenance and support of the houses of correction at *Liverpool* and *Preston*. Until the year 1809, the proportion of the county-rate was paid by the treasurer of the corporation of *Liverpool* out of the corporate funds; and since that time, the proportion of the county-rate has been, and is now, paid by the churchwardens and overseers of the poor of the said parish of *Liverpool* out of the poor rates, under 12 G. 2. c. 29. The assessment upon the said parish of *Liverpool*, in respect of said rate, is now equal to the sum of 8000*l.* per annum, or thereabouts; and the proportion payable by the parish, towards the maintenance and support of the houses of correction at *Preston* and *Liverpool*, for the last quarter, was 500*l.* and upwards. The inhabitants of the parish contribute
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to the county rate through the medium of the poor's rate, in respect of their property lying within the same; and the corporation and their tenants, like other individuals, also contribute to the county rate, in respect of its corporate estate lying as well within as without the limits of the said parish. The parish and borough of *Liverpool* are co-extensive. The justices of the borough have not any exclusive jurisdiction within it, nor have they any jurisdiction without its limits in the county at large, unless the Court may be of opinion that such jurisdiction is given to them, in certain cases, by acts of parliament, if any such there be. *John Wright, Esq.* acted as a justice of and for the borough only. The justices of the peace of the county of *Lancaster*, since the 6 G. 1., have committed prisoners charged with or convicted of petty larceny and other offences, to the houses of correction of the said county. About the year 1776, a house of correction was built within the borough of *Liverpool*, by and at the expense of the parish, the corporation contributing thereto 500*l.*, and the residue of the expense thereof being defrayed by the parish out of the poor's rates. The expense of supporting that house of correction was defrayed by the parish out of the poor's rate, from the time of the erection of the same until the year 1814, when the parish refused and discontinued to support or to permit it to be any longer used as a house of correction; and the building has never been since used as a house of correction, but has been by the parish converted into and is now used as a lunatic asylum for the parish paupers. From the time of the erection thereof in the year 1776 until the year 1814, the same was used as a public house of correction for the borough. Persons charged with petit

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larceny and other offences within the borough have, before trial at the borough sessions, been committed by the justices of the borough to the borough gaol, until the year 1812; but since that time, a considerable number have been committed by the justices of the borough to the houses of correction at *Liverpool* and *Preston*, for trial at the several courts of quarter sessions for the said county, and there received. And prisoners, in execution of their sentences for petit larceny and other offences, are constantly sent by the court of quarter sessions of the borough of *Liverpool* to the houses of correction at *Liverpool* and *Preston*, and there received, and such right of commitment is not disputed; but there has been no instance of any person committed to the county house of correction having been brought to trial at the borough sessions. The defendant is regularly appointed governor of the county-house of correction, by the county justices, and not by the justices of the borough, the latter having no share in, nor any thing to do with, his appointment. The question for the opinion of this Court was, whether the defendant, as the governor of the house of correction at *Liverpool*, was bound to deliver up *James Crookham* for trial at the general quarter sessions of the borough. The case was argued in last term by

J. Clarke, for the crown. This question turns upon the statute 15 G. 2. c. 24., which, being passed for the relief of boroughs, ought to have a liberal construction. It enacts, that borough magistrates may commit, and that the persons committed shall be received, detained, ordered, and dealt with, to all intents and purposes, as if committed by a county magistrate. Here, *Liverpool* is
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a borough contributory to the county rate; and is therefore entitled to the full benefit of the house of correction. Then, in order to have it, the borough magistrate ought to have the power of trying those prisoners whom they commit for offences within their jurisdiction; for this is a valuable franchise, *Madox Firma Burgi*, c. 11. p. 296. The act is declaratory, which strengthens the argument; and there are no negative words taking away this right, which depends on the common law principle, *qui sentit onus sentire debet et commodum*. The words are affirmative that their commitments shall be, to all intents and purposes, as those by county magistrates. Now, the commitments of county magistrates are followed by a trial before themselves at the sessions; and if commitments by borough magistrates are put, in all respects, on the same footing, the right of local trial, it should seem, must equally belong to them. Besides, this is in ease of the county magistrates. It is conceded that the borough justices have the right to commit; but it is only disputed whether, having committed, they have the right to try. In point of fact, this right is exercised, and, without dispute, by the borough magistrates throughout a great part of *England*. Here, there was a special commitment: the prisoner was committed to be tried at the borough sessions. Then the defendant, who received him under this special authority, cannot now dispute it. He referred also to *Rex v. Horton*, in B. R. (a)

J. Williams, for the defendant. The special commitment can make no difference, for the party is not indicted here for the breach of an agreement, but for

(a) Not yet reported.

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disobedience to an order of sessions. The only point is, whether the justices, who have undoubtedly a right to commit, have also the right of causing the persons committed to be brought to their borough sessions, for the purpose of trial. In *Rex v. Horton*, the only question was, whether a prisoner convicted at these borough sessions could be committed to the county house of correction. In that case this Court held, that he could be so committed, the borough being contributory to the county rate. But that is very different from the present case. These magistrates can have no power at the common law. The only authority they possess is derived from the statute law, and their commission. Now what statute is there authorizing this claim? The statute referred to does not: it authorizes them indeed to commit, but says also, that their commitments shall be to all intents and purposes as county commitments. Now the latter are always tried at the county sessions; and it should seem, therefore, to follow, that the former must be tried there too. The defendant is wholly out of their jurisdiction; he is a county officer, appointed and paid by the county. That appears from 7 *Jac.* 1. c. 4. He is, therefore, emphatically, under the controul of the county only; and the two jurisdictions are perfectly distinct. By 17 *G. 2.* c. 5. s. 31., the justices of counties and boroughs have jurisdiction *respectively* over the houses of correction in their *respective* limits; and, by 22 *G. 2.* c. 64. sess. 1. & 3., governors of houses of correction are to deliver lists to these sessions within whose *respective* jurisdictions the premises are situated. Then, if the house of correction be not within their jurisdiction, these justices have no authority to interfere; and they have a house of correction exclusively
their

their own. There was a second case of *Rex v. Horton*, argued at the same time with the former, which is precisely in point to this. The question there was, whether, under 51 G. 3. c. 143., the borough justices had a power to commit a vagrant to the county house of correction. And though the general power of commitment was admitted, yet in that case, inasmuch as by the act it appeared that the appeal from the commitment must go to the borough sessions, it was held, that in consequence of that circumstance, they could not commit to the county house of correction, there being no power for the borough magistrates to cause a person so committed to be brought back to their jurisdiction, for the purpose of hearing the appeal. That is precisely the point here.

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J. Clarke, in reply, contended, that in the last case the real ground of the decision by the Court was, that the statute created a new offence, and also appointed a special place of custody for such offenders.

Cur. adv. vult.

BAYLEY J. now delivered the opinion of the Court.

This was an indictment against the governor of one of the houses of correction for the county of *Lancaster*, situate at *Liverpool*, for not obeying an order of the quarter sessions of the borough of *Liverpool*. That order directed him to deliver to one of the borough constables, to be carried to those quarter sessions, to be tried for a felony, a prisoner, who had been committed to the house of correction by one of the borough justices. His commitment was for that felony: it directed him to be kept till those sessions; and the proper parties were bound over to prosecute and give evidence at those

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those sessions. The justices of the borough of *Liverpool* have no exclusive jurisdiction within the borough, and they have no jurisdiction in general beyond the borough. From 1776 to 1814, they had a borough house of correction, but since that time they have ceased to use it. The borough contributes its proportion to the county houses of correction, as the other parts of the county do; and the question, under these circumstances, is, whether, when a borough magistrate has committed a prisoner to the county house of correction, for a felony committed within the borough, the borough sessions can order him before them for trial. And, upon consideration, we are of opinion that they may. As the borough magistrates have no exclusive jurisdiction, the offences within the borough, generally speaking, are county offences; the offenders may be committed, *ad libitum*, either to the borough house of correction, whilst there was one, or to the county house of correction; and they may be tried, *ad libitum*, either at the borough sessions, or at the county sessions. They are county offenders, and, if not tried at the borough sessions, must, at probably a heavy expence to the county, be tried at the county sessions. The borough justices, therefore, and the borough sessions, as far as they act upon what are at the same time borough and county offences, and borough and county offenders, act in ease and aid of the county justices and county sessions, and discharge that duty which must otherwise be discharged by the county magistrates. To a certain extent, therefore, they are for that part of the county to which their power extends county magistrates. They are put upon that footing by 15 G. 2. c. 24., if that is merely an enacting law, and they were previously so if that is a declaratory law.

law. That statute recites that doubts and questions had arisen touching the commitment of offenders by justices of liberties to houses of correction of counties in which such liberties are situate, though such liberties contribute to the maintenance and support of such houses; and then it declares and enacts, that where any person, liable by law to be committed to the house of correction, shall be apprehended within any liberty, &c., whose inhabitants are contributory to the support and maintenance of the houses of correction of the county in which such liberty is situate, it shall be lawful for the justices of such liberty to commit such person to the house of correction of the county in which such liberty is situate; which person so committed shall and may be received, detained, dealt with, and ordered, and be set and kept to hard labour, or conveyed and sent away or discharged, and be subject and liable to the same correction and punishment, to all intents and purposes, as if committed by any justice of the county. The argument for the defendant proceeds upon the grounds, first, that this is merely an enacting statute, and that the liberty justices could not before have committed to the county house of correction; and, secondly, that had this commitment been by a county justice, the order in question could not legally have been made by the borough sessions. In *Trinity* term, 1816, there were two cases before the Court upon this question, both from *Liverpool*; and the points there decided, and the opinion there delivered, will materially assist us in this case. The first was an indictment against the governor of the house of correction at *Preston*, which is a county house of correction, for refusing to receive a prisoner convicted at

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at the borough sessions for *Liverpool*, of a petty larceny, and sentenced by those sessions to three months' imprisonment in the house of correction; and the other for refusing to receive a prisoner convicted, under 51 G. 3. c. 143., for being within the port and harbour of *Liverpool*, and within the borough, with intent to commit felony; and the Court held the governor bound to receive in the former case but not in the latter. Why? Because the former was a county offence, triable *ad libitum*, either at the borough or the county sessions; and the latter was merely and exclusively a borough offence, not cognizable by justices of the county, but cognizable by borough justices only; and, unless committed within the limits of the borough, no offence at all. In the former of those cases, Lord *Ellenborough* takes notice, that this statute is a declaratory act; and though it recites that doubts had existed, it considers those doubts as unfounded. Now if these doubts were unfounded, justices of liberties could, before that act, and still may, independently of that act, commit to county houses of correction to which those liberties contribute. Upon what principle could that be but upon this, that to this extent, and with reference to county offenders within their limits, they were in the nature of, and had the powers of county justices; and if this were their character, they must be considered as county justices for all purposes connected with the subject, and not for the purpose of commitment only. If they can oblige the governor to receive, why shall they be restrained from obliging him to give up? If they have the former power, by what legal principle are they deprived of the latter? Lord *Ellenborough* considers the enactment in 15 G. 2. as proceeding on the reason,
that

that they who contribute to the burthen ought to have the benefit. Ought they not, then, to have the full benefit? Why are they to be confined to cases of commitment after trial, or to those cases of commitment where the prisoner is to be tried at the county sessions? The present L. C. J. states the same principle, that they who contribute to a burthen should partake of the benefit; and intimates it, as the strong inclination of his opinion, that at common law the justices of *Liverpool*, contributing to the county rate, would have liberty to use the county house of correction. But he considers all doubt at common law as removed by 15 G. 2., and considers that act as entitled to a large and liberal, not a narrow and restrained construction. Now, if that act were an enacting statute only, and not declaratory, perhaps the words in it might not be sufficient to reach this case; because it directs, that the person committed shall be dealt with as if committed by a justice of the county; and it might be matter of doubt whether the borough sessions could order a man to be brought up to them, if his commitment were not by a borough but by a county magistrate. I intentionally use the terms "matter of doubt," because I am by no means clear they could not. But considering this, as it is, a declaratory as well as an enacting statute, would it not be a most narrow and restrained construction, and the reverse of a large and liberal one, to confine it to the letter and not to the spirit, and to say, that a borough magistrate, though he may commit to it, cannot order from it, the person whom he has so committed? The true principles of the act are, that they who contribute to the expense should have an equal, not a partial, share of the benefit; and that the borough justices should,

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should, for this purpose, at least with regard to those offences which are county offences, be considered as county justices; and that the governor of the house of correction should be under their command and controul, as to such prisoners as they commit for their part of the county, as much as he is under the command and controul of the other county magistrates, as to the prisoners whom they commit. For these reasons, we are of opinion that the judgment ought to be entered for the crown.

Judgment for the Crown.

Monday,
May 10th.

COSSEY *against* DIGGONS.

Where an avowry stated that the defendant held the premises at a certain yearly rent, to wit, the yearly rent of 72*l.* and the plaintiff pleaded, 1st, non tenuit, and, 2dly, Riens in arrear; and the first plea was found for the plaintiff: Held that the 2d plea became thereby immaterial, and that the proper course was to discharge the jury from finding any verdict upon it; but that if any verdict was entered upon it, it must be entered for the plaintiff.

REPLEVIN. The defendant pleaded three avowries, stating that the plaintiff held and enjoyed the premises in which, &c. of her the defendant, by virtue of a certain demise theretofore made at and under a certain yearly rent, to wit, *the yearly rent of 72*l.**, payable half-yearly, and avowed in the first avowry for one year and a half's rent; in the second, for half a year; and in the third, for 96*l.* 10*s.* 10*d.*, parcel of one year and a half's rent. The plaintiff pleaded in bar to each avowry: first, that he did not hold and enjoy the premises in which, &c. *at and under the yearly rent of 72*l.**, payable, as in the same avowry mentioned, in manner and form as in the same avowry alleged; and, secondly, that nothing of *the said rent in the same avowry mentioned* was in arrear to the defendant: upon all which pleas issue was joined. At the trial before *Graham B.*, at the last assizes for the county of *Suffolk*, the rent was proved to be 72*l.* 9*s.* per annum,

annum, upon which the plaintiff contended that all the issues ought to be found for him ; for if the rent mentioned in the avowries was negatived, nothing of that rent could be in arrear. The learned Judge told the jury that there were two questions for them to consider, first, whether the plaintiff held at 72*l.* a year ; 2dly, whether any thing was due. As to the first, he said that the plaintiff, having denied that he ever held at 72*l.* a year, the defendant was bound by her avowries to prove that tenure ; and that where a landlady undertook to prove a given rent, she must prove it accurately, as laid. As to the second point, he stated to them that his present opinion was, that they ought, on the pleas of riens in arrear, to fine what rent was due. The jury found the rent to be 72*l.* 9*s.* ; and that 36*l.* 4*s.* 6*d.* was due for half a year's rent. The associate being at a loss how to enter the verdict,

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Bayly, on a former day, moved for a rule nisi to enter the verdict for the plaintiff, with one shilling damages upon the three pleas, denying the holding at the rent mentioned in the avowries, according to the legal effect of the finding of the jury ; and to deliver the postea to the plaintiff ; and also to enter the verdict for the plaintiff upon the three pleas of riens in arrear, according to the legal effect of the finding of the jury upon the whole case.

The Court said, that by the finding of the jury upon the first issues, the second became wholly immaterial ; and that the proper course would have been to have discharged the jury from finding any verdict at all upon them. As, however, no verdict at all had been entered
on

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on the record, they said they had at present no jurisdiction; and that the proper mode of proceeding would be to make an application to the learned Judge who tried the cause to direct in what way the verdict should be entered. (a)

An application to the same effect as the proposed rule having been afterwards made before *Graham B.*,

Storks shewed cause. He contended, first, that the defendant was not bound to prove the exact rent stated in the avowries, in which it was laid under a videlicet. On the second point, he urged, that the defendant was entitled to have the verdict entered in his favour upon the pleas of *riens in arrear*, inasmuch as those pleas admitted the tenure; and the only questions upon them were, whether any thing, and how much, was due. The jury, therefore, by finding 36*l.* 4*s.* 6*d.* for half a year's rent to be due, had found for the defendant upon those pleas.

Bayly, *contra*, contended, first, that the amount of the yearly rent under which the plaintiff was stated in the avowries to have held was material, and must be proved as laid; and, secondly, that though the plea of *riens in arrear*, when pleaded alone before the statute 1 *Ann.* c. 16., admitted the tenure, yet, since that act which authorizes the pleading, not several pleas, but several matters, it was competent to the plaintiff, both to deny that he held under the rent mentioned in the avowries, and also to allege, that nothing of the said rent in the said avowries mentioned, was in arrear; and, therefore, that it was impossible, whilst both pleas stood, that he could be considered as having admitted, what he at the

(a) We have been favoured by the learned counsel with a note of what passed on the argument before Mr. Baron *Graham*.

same

same time denied, as he had a right to do by the statute. It would be attended with great inconvenience and waste of time at the assizes, where the first issue which disposed of the cause was found for the plaintiff or the defendant, if the jury were afterwards required to go on and try other points, which, by their first finding, had become immaterial: as where in an action of trespass, for breaking and entering the plaintiff's close, upon a plea of not guilty, and a right of common, or a right of way, the jury found that the close was not the plaintiff's, it would be absurd to go on and to try whether the defendant had a right of common, or a right of way upon it, which would occupy many hours. So here, to require the jury, after they had found that no such rent as is mentioned in the avowries ever existed, to find that so much of the very same rent was due and in arrear, would be calling upon them to stultify themselves. The finding of the jury upon these latter pleas was wrong in every way, for they had found not that 36*l.*, which is half a year of the rent mentioned in the avowries, but that 36*l.* 4*s.* 6*d.* for half a year's rent, which is another and different rent, was in arrear, which was in effect a finding for the plaintiff; if then the defendant was entitled to a verdict upon such a finding as this, it would follow that she might, under the statute 17 *Car.* 2. *c.* 7., have proved the value of the goods distrained, and have had execution against the plaintiff, though the cause was determined in his favour for rent she had never avowed for, and which was never in question upon the pleadings.

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GRAHAM B. upon the first point said, that he retained the opinion he had expressed at the trial, that

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the exact amount of the rent must be proved, and cited *Bristow v. Wright* (a), where, though it was not necessary for the plaintiff to state the particulars of the demise, yet, having stated them, the Court held, that he was bound to prove them exactly as laid. Upon the second finding, he said, he thought that the finding was substantially in favour of the plaintiff upon the last pleas also, and accordingly directed the verdict to be entered for the plaintiff upon all the issues.

(a) Dougl. 565.

Monday,
May 10th.

The KING against FLETCHER RIGGE, Esq.

It is a good custom in a manor that the steward or his deputy should have the sole right of preparing all the surrenders of copyhold tenements within the manor.

E. ALDERSON moved for a mandamus to be directed to the defendant, as learned steward of the manor of *Osmotherly*, in the North Riding of the county of *York*, commanding him to receive and examine a surrender of a copyhold tenement within that manor. The defendant had, on application, refused to receive it, on the sole ground, that the surrender had not been prepared by the deputy-steward of the manor (there being a custom to that effect), but by the attorney for the parties. All the requisite fees, &c. had been tendered. It was now contended, that this was a bad custom, being in restraint of common right. Every one has a right to choose such legal adviser as he may think proper, and in whom he may have confidence. And, supposing that the deputy-steward was, as he might be, incompetent to the office, it would be hard to prohibit the copyholders from other assistance. The nearest cases to this, are those of the mill and bakehouse, in which

which it has been held not to be a bad custom, that all the copyholders should grind at the lord's mill, and bake at his bakehouse. But the ground for this is said in 1 *Rolle*, 559. *pl.* 40., to be that possibly there was an express agreement to that effect between the lord and his tenants on the erection of the mill or bakehouse at the expense of the lord. No similar ground can be laid for the origin of this custom, which is therefore bad, as not having had a reasonable commencement. *Com. Dig.* Copyhold, S. 10.

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Per Curiam. In former times the tenant would have come into court, and verbally surrendered to the steward, who would then have recorded the surrender, and given to him a copy of it. The tenant can only alien his property by custom, and by custom there may be this qualification of his right to alien, that the surrender be prepared by the steward or his deputy; and the custom is advantageous to the tenant, for the steward is bound to prepare the surrender for a fixed fee, and is likely to be better acquainted with the different customary tenements than any stranger can be.

Rule refused.

IRONS *against* SMALLPIECE.

Tuesday,
May 11th.

TROVER for two colts. Plea, not guilty. The defendant was the executrix and residuary legatee of the plaintiff's father, and the plaintiff claimed the colts, under a verbal gift made to him by the testator twelve months before his death. The colts, however, continued to remain in possession of the father until his death. It appeared, further, that about six months before the father's death, the son having been

A verbal gift of a chattel, without actual delivery, does not pass the property to the donee.

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against
Smallpiece.

to a neighbouring market for the purpose of purchasing hay for the colts, and finding the price of that article very high, mentioned the circumstance to his father; and that the latter agreed to furnish for the colts any hay they might want at a stipulated price, to be paid by the son. None, however, was furnished to them till within three or four days before the testator's death. Upon these facts, *Abbott C. J.* was of opinion, that the possession of the colts never having been delivered to the plaintiff, the property therein had not vested in him by the gift; but that it continued in the testator at the time of his death, and consequently that it passed to his executrix under the will; and the plaintiff was therefore nonsuited.

Gurney now moved to set aside this nonsuit. By the gift, the property of the colts passed to the son without any actual delivery. In *Wortes v. Clifton (a)*, it is laid down by *Coke C. J.*, that, by the civil law, a gift of goods is not good without delivery; but, in our law, it is otherwise; and this is recognized in *Shepherd's Touchstone*, tit. *Gift*, 226. Here, too, from the time of the contract by the father to furnish hay for the colts at the son's expense, the father became a mere bailee, and his possession was the possession of the son; and an action might now be maintained by the defendant, in her character of executrix, upon that contract, for the price of the hay actually provided.

ABBOTT C. J. I am of opinion, that by the law of *England*, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.

(a) *Roll, Rep.* 61.

Here

Here the gift is merely verbal, and differs from a donatio mortis causâ only in this respect, that the latter is subject to a condition, that if the donor live the thing shall be restored to him. Now, it is a well established rule of law, that a donatio mortis causâ does not transfer the property without an actual delivery. The possession must be transferred, in point of fact; and the late case of *Bunn v. Markham* (a), where all the former authorities were considered, is a very strong authority upon that subject. There Sir G. Clifton had written upon the parcels containing the property the names of the parties for whom they were intended, and had requested his natural son to see the property delivered to the donees. It was therefore manifestly his intention that the property should pass to the donees; yet, as there was no actual delivery, the Court of Common Pleas held that it was not a valid gift. I cannot distinguish that case from the present, and therefore think that this property in the colts did not pass to the son by the verbal gift: and I cannot agree that the son can be charged with the hay which was provided for these colts three or four days before the father's death; for I cannot think that that tardy supply can be referred to the contract which was made so many months before.

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HOLROYD J. (b) I am also of the same opinion. In order to change the property by a gift of this description, there must be a change of possession: here there has been no change of possession. If, indeed, it could be made out that the son was chargeable for the hay provided for the colts, then the possession of the

(a) 2 Marsh. 532.

(b) Bayley J. was in the Bail Court.

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father might be considered as the possession of the son. Here, however, no hay is delivered during a long interval from the time of the contract, until within a few days of the father's death; and I cannot think that the hay so delivered is to be considered as delivered in execution of that contract made so long before, and consequently the son is not chargeable for the price of it.

BEST J. concurred.

ABBOTT C. J. The dictum of Lord *Coke* in the case cited must be understood to apply to a deed of gift; for a party cannot avoid his own voluntary deed, although he may his own voluntary promise.

Rule refused.

Tuesday,
May 11th.

TYRWHITT against WYNNE, Bart. and Another.

Where, on trespass for pulling down a wall, the issue was, whether certain common land was the soil and freehold of the lord of the manor, on which the plaintiff was entitled to a right of common, or the soil and freehold of the plaintiff: Held that leases of minerals, &c. granted by the lord to other persons in other parts of the un-

inclosed waste land were not receivable in evidence, unless it was first shewn that the locus in quo formed part of one entire waste, to which those leases were applicable.

Held, also, that the effect of such leases, if received, would only be to prove that the lord was entitled to the minerals under the locus in quo, and not to the surface.

TRESPASS for entering the plaintiff's close, and breaking down a wall. Plea, that the place in which, &c. was the soil and freehold of the defendant, Sir *W. W. Wynne*, upon which issue was joined. At the trial at the last summer assizes for the county of *Salop*, before *Garrow B.*, the question was, whether the plaintiff, who was the recent purchaser of a farm called *Blaen Nantir*, which consisted of about sixty acres of arable land, was also entitled to the soil of about 1000 acres of mountain land, part of which was the locus in quo, or only to a right of common thereon. The plain-

tiff produced no documentary evidence or title deeds; but rested his case on the proof of various acts of ownership on the place in question by the owners of *Blaen Nantir* farm for sixty years, by feeding sheep exclusively thereon, cutting trees, turf, and fern, and granting leave to other persons to do so. The defendant, Sir *W. W. Wynne*, claimed the soil and freehold of this land as lord of the manor, and proved different acts of enjoyment by shooting repeatedly by himself and game-keeper, without interruption, on the premises in question, and also by collecting and taking estrays, and forbidding the burning of the gorse growing thereon; and then gave in evidence a grant dated 29th April, 9 Jac. 1., from the crown to *Edward Lord Wootton*, "of all the house and site of the late monastery of *Valle Crucis*, various closes of land, the manor of *Langwest*, in the lordship of *Yale* and the manor of *Wrexham*, and all the wastes, &c. thereto belonging." They then (having given due notice to the plaintiff) called on the plaintiff to produce a grant from Lord *Wootton* of the premises of *Blaen Nantir*: on which the plaintiff produced a parchment without signatures or seals. This the defendant proposed to read as a deed, or at least as evidence of one, which the learned Judge would not permit. He, however, upon the authority of *Roe, d. Brune, v. Rawlins* (a), received it in evidence as a document coming out of the hands of the opposite party. It was dated 29th November, 1614, and was from Lord *Wootton* to *Edwards*, of two tenements, one of which consisted of sixty-one and a half acres, or thereabouts, in various closes there named, together

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(a) 7 East, 279.

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with all commons of pasture and of turbary on the mountain, and all other the waste lands belonging to the abbey of *Valle Crucis*, reserving to the grantor all mines and minerals and timber trees, together with a right to cut turves and a rent heriot and a relief heriot, and a fine on alienation, with a clause of distress if not paid: a fee-farm rent of 4*l.* 13*s.* 4*d.* was also reserved jointly for the two tenements granted. They then gave in evidence a grant dated *September 4. 1686*, from *Richard Edwards, John Ap Thomas, and William* his son, to *William Williams, Esq.* of a messuage and land in *Nantir* in fee; and proved farther, that from the year 1712 down to the present time, two different fee-farm rents, of 2*l.* 6*s.* 8*d.* each, appeared in the steward's accounts belonging to the family of *Wynne*, one as being received from the owner of *Blaen Nantir* farm, and the other from another farm called *Blaen Cwm*, both in the parish of *Nantir*. It appeared that *Sir W. W. Wynne* was the representative both of *Lord Wootton* and *William Williams, Esq.* They then proposed to read, in evidence, counterparts of leases granted to different persons not connected with the plaintiff, of minerals in other parts of the waste of the manor, but not in the place in question. The learned Judge rejected these, and told the jury that the parchment dated 1614, which had been read in evidence, was not entitled, under the circumstances of the case, to much weight, and was not to be considered by them as any evidence of a deed of that tenor; and the jury thereupon found a verdict for the plaintiff.

Peake, in last *Michaelmas* term, obtained a rule nisi for a new trial on two grounds: first, that the Judge had not given full effect to the grant of 1614; and
secondly,

secondly, that he had improperly rejected the evidence of the leases of the minerals. And now

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Jervis and *Campbell* shewed cause. The document could not be considered as a deed, and the learned Judge did receive it in the only way in which it could be evidence, viz. as a document coming out of the plaintiff's hands. And all the weight which was proper to be given to it was given; for the acts of enjoyment proved were wholly inconsistent with that deed, and were quite sufficient to outweigh it altogether. As to the rejection of the leases, it is to be observed that the question was not, what rights the defendant had upon the wastes of this manor, but, whether the locus in quo was or was not parcel of those wastes. Now, how could acts of ownership on the other parts of those wastes prove that the locus in quo was part of them? Besides, if they had been received, they could have been of no importance to the verdict.

Peake, *W. E. Taunton*, and *Temple*, in support of the rule. Sufficient weight was not given to the deed produced. The Judge told the jury that it was entitled to no weight; but as coming out of the hands of the opposite party, it ought to have been left to the jury to decide upon its effects. *Doe, d. Johnson, v. The Earl of Pembroke* (a), is a strong case to shew the effect given to a paper found in the possession of a party interested. The quantity of land in that deed almost exactly tallies with the plaintiff's farm; and the payment of 2*l.* 6*s.* 8*d.* by him to the defendant is a strong

(a) 11 *East*, 504.

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corroborating circumstance; for the deed of 1686 shews that one of the two tenements mentioned in that of 1614 was transferred to *William Williams, Esq.*, and of course the annual rent of 4*l.* 13*s.* 4*d.* then became divided, which exactly accords with the evidence of the different stewards' accounts. Then, if it be admitted that this deed applies to the land, it appears to have been a grant only of a right of common, which explains the different acts of enjoyment on the part of the plaintiff. On the second point, they contended, on the authority of the cases of *Barry v. Bebbington* (a), and *Stanley v. White* (b), that the leases ought to have been received in evidence. The ground of rejection on the trial was, that the plaintiff was not party to them; but that is immaterial, *Clarkson v. Woodhouse* (c), *Rogers v. Allen*. (d) They relied, also, on the acts of ownership exercised by the defendant *Wynne*, as laying a foundation for the admission of the documentary evidence in question.

ABBOTT C. J. The Court have listened attentively to the argument in support of this rule, because it is a question said to be of importance in that part of the country where it arises; but after the fullest consideration, I am of opinion that no new trial should, in this case, be granted. One ground on which this cause has been argued is, that the learned Judge rejected certain leases of minerals in other parts of the wastes of this manor. Now, even supposing that in strictness these were receivable in evidence, still that alone will not be sufficient; for it must be further shewn and sub-

(a) 4 T. R. 514.

(b) 14 East, 332.

(c) 5 T. R. 412.

(d) 1 Campb. 309.

stantiated,

stantiated, that if they had been received, they would have led to a probable conclusion in favour of the defendant; but I am clearly of opinion they would not, and that the rejection was not of any importance as to the result of the verdict. No new trial, therefore, ought to be granted on this ground. Then, it is said that the learned Judge did not give full effect to the deed which was produced and read, and that he told the jury that they ought not to place any reliance upon that document. I cannot say that he was wrong in that observation; for even supposing it to be a deed, which is doubtful, or a copy of a deed, still it does not appear to me to afford any sufficient evidence to conflict with that given for the plaintiff. The circumstances do not seem to me sufficient to connect this deed in any way with the plaintiff's land. There is, indeed, about the same quantity of acres; but that is of little importance. Then the payment of the sum of 2*l.* 6*s.* 8*d.* is relied on, the deed having specified the payment for two tenements of the fee-farm rent of 4*l.* 13*s.* 4*d.* Supposing, however, that these have weight, it is to be remembered that there are other circumstances weighing on the opposite side. The deed reserves the timber to the lord; but that has been cut by the plaintiff and his predecessors. There is also a heriot and fine payable on the death of the tenant; but no fine or heriot have ever been received. Then, the grantee was to have right of common over all the commons, a right which the tenant of this farm has never enjoyed. These are circumstances shewing that the plaintiff's estate is not either of the tenements mentioned in this deed; but even supposing that it is, the deed grants certain closes, together with all commons, &c. It may be doubtful whether

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whether by this word "commons" the soil and freehold of the uninclosed lands, and not merely a right of common thereon, did not pass. The facts of enjoyment proved by the plaintiff would lead to such a conclusion, and corroborate this idea. Under all these circumstances, I cannot think that the learned Judge was wrong in telling the jury to lay very little stress on this document. On the second ground, therefore, there is no reason for a new trial, and the rule must accordingly be discharged.

BAYLEY J. I think, upon looking at the whole of this case, that this document was entitled to but little weight. It does not appear that it was ever executed, nor that there was any original deed. Admitting, however, that there was one, it does not seem to me to conclude any thing upon this question. The plaintiff claims sixty acres of inclosed and 1000 acres of uninclosed land. And, upon this latter district, which includes the locus in quo, the plaintiff alone has exercised acts of ownership. For those given in evidence by the defendant, of shooting, and appointing a gamekeeper, &c., are not properly referable to a right of soil. Unless the deed refer to other lands, or receive the construction last mentioned by my Lord Chief Justice, I do not see how it can be consistent with the rights exercised by the plaintiff. He has cut trees, and the deed, a copy of which has been in the defendant's possession during all the time, expressly reserves the trees out of the grant. Then the lord reserves also a right to dig turves, which has only been exercised by the express consent of the plaintiff, given to Sir *W. W. Wynne*, on his application for that purpose. Now it is impossible to suppose, that if there
had

had existed the right, such an application would ever have been made. Under the deed there is reserved a rent heriot, and a relief heriot, and a fine on alienation; but none have ever been demanded. Then, as to the fee-farm rent, it is said, that by the deed of 1686, one tenement came into the *Wynne* family; and so only 2*l.* 6*s.* 8*d.* remained payable of the 4*l.* 13*s.* 4*d.* reserved by the deed. But there is nothing in that deed which at all identifies the land with either of the tenements contained in that of 1614. And the farm included in the deed of 1686 has never exercised any right whatsoever on this moor. I think, therefore, that in the observations made on this document, the learned Judge was right. On the other point, also, I am of opinion, that the evidence was, in this case, properly rejected. When once it has been established that the locus in quo is part of one entire district, honor, or manor, it is competent to give in evidence acts done on other parts of that district, honor, or manor, in order to shew a right to the locus in quo. But here that preliminary proof was not given. Besides, if it had, proving a right in other parts of the waste to the minerals would not have been material. The only inference would then have been, that the defendant was entitled to the minerals here: but that would not have been sufficient to justify the present trespass. I am therefore of opinion that there should not be a new trial.

HOLROYD J. I am of the same opinion. The leases were properly rejected on account of no previous proof being given that the locus in quo was part of a larger district to which those leases applied; and if they had been received, they would only have been evidence of the defendant's right to the minerals under the locus in quo,

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quo. The other document which was received does not appear to me to have been applicable to the lands in question; and if it were, the usage confirms the construction given to it by my Lord C. J. Upon the whole, I think there is no ground for a new trial.

BEST J. concurred.

Rule discharged.

Tuesday,
May 11th.

DEW, Esq. *against* PARSONS, Gent.

Where a sheriff claimed as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law: Held that the latter might maintain money had and received for the excess paid above the legal fee, or might set off the same in an action by the sheriff against him.

Held, also, that the sheriff was not entitled to more than a fee of fourpence upon every warrant issued by him.

DECLARATION for work and labour, and money counts. Plea, general issue, and notice of set-off. The action was brought by the plaintiff as sheriff of the county of *Hereford*, to recover from the defendant, an attorney residing in a neighbouring county, 4s. 1d., being 3s. 6d. claimed by the plaintiff, as the fee on a warrant issued by him, in a cause in which the defendant was attorney, and 7d. for the postage of a letter. The defendant claimed to set off either the whole or part of a sum of 10s. 6d. which his clerk had paid to the plaintiff on the issuing three warrants under one writ against three defendants. The clerk paid it, on its being claimed by the plaintiff, as of right, for the warrants, and on mentioning it to the defendant, the latter disapproved of it, and said that it was an imposition. The plaintiff claimed a fee of 3s. 6d. for every warrant when issued for an attorney residing out of his county, and 2s. 6d. when issued for an attorney residing within the county; and it appeared that such fees had for many years usually been paid in the county of *Hereford*. If he was entitled only to 2s. 6d. on each warrant,

rant, then there was a balance of one penny due to him; if he was entitled to less than that sum, then he was not entitled to recover. At the trial before *Holroyd J.* at the last Summer assizes for the county of *Hereford*, the plaintiff objected that this was a payment made with a full knowledge of all the facts, though under a misapprehension as to his legal liability, and therefore that it could not be recovered back, and consequently was not the subject of set-off. The learned Judge admitted the evidence, and was of opinion that the plaintiff was entitled to charge only 4*d.* for each warrant, and the balance of the account being then against the plaintiff, he was nonsuited. A rule nisi having been obtained in last *Michaelmas* term for setting aside this nonsuit,

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Cross now shewed cause. The defendant is clearly entitled to set off a sum of money which was wrongfully exacted from him under a claim of right. It is against good conscience that the plaintiff should retain it, and money had and received will, therefore, lie against him to recover it back. *Bize v. Dickason* (a), *Astley v. Reynolds* (b), *Jons v. Perchard* (c), *Longdill v. Jones* (d), are authorities in point, and if so, it may be claimed by way of set-off in this action. The sheriff at common law was not entitled to make any charge to the suitors for executing the process of the Court. He is bound by law to execute the process of the Court. He is an officer of the Court for that purpose; to refuse to execute the process is an indictable offence, and he may be compelled by attachment, *Dalton*, Sheriff, 202. *Hescott's case*. (a) At common law, therefore, the

(a) 1 T. R. 285.

(b) Str. 915.

(c) 2 Esp. 507.

(d) 1 Starkie, 345.

(e) Salk. 330.

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sheriff has no claim which he can enforce by action. By the statute *Westminster* 1. c. 26., which Lord *Coke* says was made in affirmance of the common law, it is expressly enacted, "that no sheriff shall take any reward to do his office, but shall be paid of that which they hold of the king, and he that so doth shall yield twice as much, and be punished at the king's pleasure." Lord *Coke*, in commenting on this statute (a), says at this day they can take no more for doing their office than has been since this act allowed to them by authority of parliament. *Walden v. Vessey* (b), *Woodgate v. Knatchbull* (c), and the judgment of Lord *Ellenborough* C. J. in *Graham v. Grylls* (d), are authorities to shew that at common law the sheriff could not take any fees for executing his office. The right, therefore, if it exist at all, must be by statute. The first and only statute upon the subject of warrants, is the 23 *Hen.* 6. c. 9.; it enacts that the sheriff shall take no more than 4*d.* for the making of any warrant or precept; the word warrant being coupled with precept must mean this species of warrant: but if this be not a warrant within the meaning of that act, the plaintiff is entitled to no fee whatever. If it be within the act, then he can only claim 4*d.* for each warrant, and if so, he has been overpaid.

W. E. Taunton. The defendant is not entitled to set off in this action this sum of money which he was not compellable to pay, but which, with a full knowledge of all the facts, though under a mistake as to the law, he actually paid to a person claiming as of right; and

(a) 2 *Inst.* 210.(c) 2 *T. R.* 158.(b) *Latch.* 15.(d) 2 *M. & S.* 297.

Brisbane v. Dacres (a), is an authority upon this point. Secondly, this is not claimed as a fee, but a compensation for work and labour. It is physically impossible for the sheriff to execute in person all the duties of his office; it becomes a matter of necessity, therefore, to employ others in his aid, and such persons must be remunerated for their labour; and it is most reasonable that the sheriff should be allowed to receive a compensation from suitors for doing that which it is impossible for one person to perform. The statute of 23 *Hen. 6.* applies to the case of defendants and not of plaintiffs. For that statute enacts, that the sheriff, &c. shall let out of prison all persons by them arrested or being in their custody, under any bill or warrant, &c., and then the same clause goes on to say, that the sheriff shall take no more fee than four-pence for every warrant. It applies, therefore, to fees claimed of defendants arrested and in his custody, and not to fees claimed of plaintiffs. And he cited (b) *Fuller v. Prest*, and *Creswell v. Hoghton* (c), to shew, that this was generally understood to be the meaning of the act. And *Martin v. Slade* (d), is an authority expressly in point to shew, that at this day, the fees of the sheriffs are not to be regulated by the stat. *Hen. 6.* Besides, it has been the invariable practice to allow as costs between parties in the suit, reasonable fees, paid to the sheriff upon all warrants. *Boldero v. Mosse.* (e)

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ABBOTT C. J. This question comes before the Court in a different shape from those which existed in the cases cited. For this is in substance like an action by

(a) 5 *Taunt.* 143.(b) 7 *T. R.* 109.(c) 6 *T. R.* 355.(d) 2 *New Rep.* 59.(e) 3 *T. R.* 417.

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the sheriff to recover his fees; and in that case, he must by law make out his title to them; and if he does not do so, the defendant will be entitled to set off the sum which has been overpaid. We do not feel ourselves at liberty to say that the usage which is stated to have prevailed is sufficient to have repealed an act of parliament. At the common law, the sheriff was not entitled to make any charge for executing a writ, and therefore, if he has any claim, it must be under the provisions of some statute. That brings us to the consideration of the statute 23 *Hen. 6. c. 9.*; and the question is, whether the word warrant, there used, in respect of which the sum of 4*d.* only is to be paid, means such a warrant as that for which the charge which is the subject of the present action is made. And it seems to me that it does, and that the sheriff was only entitled to make the charge of 4*d.* for each of these warrants. But if this were not so, it will not materially affect our judgment on the present occasion. For if this case be not within the 23 *Hen. 6. c. 9.*, the sheriff would not be entitled to any thing. The charge in this case may be reasonable, but it is contrary to law, and cannot, therefore, be allowed. The consequence is, that this rule must be discharged.

HOLROYD J. (a) I am of the same opinion, that this nonsuit must stand. If the defendant has paid more money than the sheriff is allowed by law to demand as his fee, the sheriff cannot retain that surplus, and must (if required so to do) return it to the

(a) Bayley J. had left the Court.

defend-

defendant. It follows, therefore, that the defendant has a right of set-off on the present occasion. Now the sheriff is not entitled to any fees, except those given to him by some act of parliament; and the only act within which these warrants seem to be included is the 23 *Hen. 6.* s. 9. By that act, the sheriff is empowered to take only 4*d.* for each warrant. If so, unless some other act of parliament can be found to authorize a larger payment, the sheriff can make no further claim, for no usage can prevail against a positive enactment of the legislature. It is said, that larger sums than those mentioned in the 23 *Hen. 6.* have been allowed in different cases. But there is not any case which shews that those sums have been allowed upon a claim made by the sheriff or his bailiff; and perhaps those cases can be explained thus. The plaintiff may desire a special bailiff to be named for the purpose of executing the writ, and for that he may be liable to pay a reasonable sum to the sheriff, and that sum may have been allowed to him on his taxation of costs, as being an expence reasonably incurred by him in the course of a cause. In that way, perhaps, the allowance of one guinea, levy money, mentioned in some of the cases, may be supported. But this case is very distinguishable, and seems to me to fall within the very words of the statute.

BEST J. Where the sheriff makes a claim for fees he is to be strictly confined to the limits allowed by the law; but a party who has actually paid the fees claimed in the course of a cause, may be in a very different situation from the sheriff who has claimed them, and may have such allowed to him in taxation of costs, as he may reasonably be expected to pay. No act of

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parliament authorises the fees claimed in this case; and it is quite clear, at common law, that the sheriff is entitled to no compensation. Besides, if independently of any act of parliament, it were competent for him to establish a claim by usage, still no sufficient usage has been proved to exist in this case; for that which is stated to exist is quite absurd, being 8s. 6d. for each warrant, if the attorney resides within the county, and 2s. 6d. if he resides out of it. If, however, it had been a reasonable usage, it could not have been set up against an act of parliament. The case stands thus: if it be within the stat. 23 Hen. 6. the sheriff is entitled to 4d.: If it be not, he is entitled to nothing. Then, as to the question of set-off, I am clearly of opinion that the defendant is entitled to set off what he has overpaid to the sheriff; for this is not like *Brisbane v. Dacres*, the case of a voluntary payment. In that case, both parties were equally cognizant of the situation in which they stood; but here that was not the case. Upon the whole, I think the nonsuit was right, and that this rule must be discharged.

Rule discharged.

Friday,
May 14th.

SANSOM and Others *against* GOODE.

A warrant of attorney to confess judgment is not void for omitting to state in the defence a collateral security for the same debt.

PULLER had obtained a rule nisi in this cause, for setting aside a warrant of attorney, and the judgment and execution thereon, on the ground that the defence only stated the sum secured by the judgment, without noticing collateral securities. It ap-

appeared, upon the affidavits, that in *January*, 1818, the defendant had given his promissory note to the plaintiffs for the amount of 3093*l.*, in payment of goods which he had purchased. A meeting afterwards took place between the parties for the purpose of arranging the mode of paying the debt. The defendant then, to prove his solvency, produced invoices of consignments of goods coming to him from abroad; he was, however, arrested at that meeting, and the plaintiffs insisted upon his executing the warrant of attorney in question, with power to them to reserve to themselves the consignments when they should arrive. The warrant of attorney was accordingly executed, and the indorsement merely stated, that it was given to secure the payment of the sum mentioned, with lawful interest, and the costs of entering up the judgment, without mentioning the collateral security of the promissory note; and the Court granted the rule, on the authority of *Morell v. Dubost*. (a) And now, after hearing *Marryat* against, and *Puller* in support, of the rule,

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Per Curiam. It was decided by this court, in the case of *Shaw v. Evans* (b), that a warrant of attorney is not avoided against an innocent party, by an entire omission to comply with the rule of *Michaelmas*, 42 G. 3. It follows, therefore, that the defect of a defeazance, in omitting only to state a collateral security for the debt for which the warrant of attorney is given, does not avoid that instrument.

Rule discharged. (c).

(a) 3 Taunt. 235.

(b) 14 East, 576.

(c) *Partridge v. Fraser*, 7 Taunt. 307.

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Saturday,
May 15th.The KING *against* The Company of Proprietors
of the BIRMINGHAM Canal Navigations.

Where a canal was made under the 8 G. 3., which contained no clause as to the mode of charging it to the parochial rates, and another canal was made under the 23 G. 3. c. 92., and was therein directed to be rated in a special manner, and these two canals were incorporated by the 24 G. 3., by which it was provided that all the clauses, powers, provisions, restrictions, exemptions, &c. contained in each of the two former acts should still remain distinct from each other; and afterwards by 58 G. 3. c. 19., reciting that it was expedient to extend one

UPON hearing the appeal of the company of proprietors of the *Birmingham* canal navigations, against a rate made for the relief of the poor of the parish of *Bushbury* and hamlet of *Moseley*, in the county of *Stafford*, whereby they were rated for their houses, lands, locks, towing-paths, and that part of the canal lying within the parish of *Bushbury*, and for tolls and duties arising therefrom, at the sum of 36*l.* 2*s.* 6*d.*, the sessions confirmed the rate, subject to the opinion of this Court, upon the following case.

By 8 G. 3. c. 38. a power was given of making and maintaining a navigable cut or canal from *Birmingham* to *Bilston*, and from thence to *Autherley*, in the parish of *Bushbury*, there to communicate with the canal making between the rivers *Severn* and *Trent*; and the proprietors were incorporated by the name of The Proprietors of the *Birmingham* Canal Navigation. That act did not contain any provisions or clause relating to parochial rates or charges. By 23 G. 3. c. 92., the proprietors of another undertaking were incorporated by the name of The Company of Proprietors of the

system of management to the whole canal, it was enacted "That all the canals, &c. so made as aforesaid under the former acts, or any of them, should be deemed part, parcel, and member of the *Birmingham* Canal Navigations, and be considered as included and governed by all the clauses, &c. in the 23 & 24 G. 3., (save and except so much thereof as related to exemptions from stamp duties, or the quantum of tolls to be collected,) *As if the same had been described in the 23 G. 3., as part of the works to be made and done under and by virtue of that act:*" It was held that this provision only incorporated these canals, &c. for the purpose of management, and that it did not authorise the canal originally made under the 8 G. 3. to be rated to the parochial taxes in the special manner pointed out by the 23 G. 3.

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Birmingham and Fazeley Canal Navigation. And by that act it was enacted that the said company of proprietors should from time to time be rated to all parliamentary and parochial taxes, rates, and assessments, for or or in respect of the lands and grounds to be purchased or taken, and all warehouses and other buildings to be erected by the said company of proprietors, in pursuance of this act, in the same proportions as other lands, grounds, and buildings lying near the same are or shall be rated. By 24 G. 3. sess. 2. c. 4. these two companies were united and incorporated together into one body corporate, by the name of The Company of Proprietors of the *Birmingham and Birmingham and Fazeley Canal Navigations.* And it was thereby enacted, that none of the clauses, powers, provisions, restrictions, exemptions, matters, and things, contained in the 8 G. 3., were meant or intended, or should be deemed, adjudged, or taken to extend to the navigable canals or cuts, or other works authorized to be made by the 23 G. 3.; and that none of the clauses, powers, provisions, restrictions, exemptions, matters, and things contained in the said last-mentioned act, were meant or intended, or should be deemed, adjudged, or taken to extend to the navigable canal or cuts, or to any other works authorized to be made by the 8 G. 3., but that the same should be and remain separate and distinct from each other, in like manner as they would have done in case that act had not been made, or the said respective companies had not been united. Subsequently to this period, several other acts passed relative to these canals, by one of which their name of incorporation was changed to "The Company of Proprietors of the *Birmingham Canal Navigations.*" By 58 G. 3. c. 19. intituled "An Act for altering ex-

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plain, and amending the several acts of parliament passed, relating to the *Birmingham* canal navigations, and for improving the said canal navigations;" after reciting the acts of the 8th, 9th, 23d, 24th, 25th, 46th, 51st, and 55th years of the reign of his said majesty, and after reciting that, in pursuance of the said several recited acts or some of them, the company of proprietors of the *Birmingham* canal navigations had made several different navigable canals, cuts, and communications: all which had been ascertained to be of very great public utility, and that doubts had arisen and then existed, whether the whole and every part of the canals and cuts intended to be comprized under the name of *The Birmingham Canal Navigations*, had been duly incorporated therewith; and it had been found very inconvenient to have different acts of parliament, applicable for the same purposes, to different yet intersecting and adjoining parts of the said *Birmingham* canal navigations; and it was highly expedient to extend one system of management to the whole thereof, in such way as to render the same more simple, and to alter such parts of the former system as were, by experience, found improper, or had been by circumstances rendered unavailing, and particularly to empower the said company of proprietors of the *Birmingham* canal navigations to contract by the year or otherwise, with the owners of iron and other works situate near the same, for the tonnage of raw materials carried to or for the use of their works along the line of the said canal, without passing a lock, which would be very desirable for the owners of such iron and other works, and of great public benefit; it was enacted, that from and after the passing of that act, "all the canals, collateral cuts, and

and navigable communications so made as aforesaid, by the company of proprietors of the *Birmingham* canal navigations, under and by virtue of all or any of the said recited acts, or any of them, shall from the time of the making thereof respectively be and be deemed, taken, and considered to be as part, parcel, and member of the *Birmingham* canal navigations; and all and every such part and parts of the said canals, collateral cuts, and navigable communications, and the lands, buildings, tenements, and hereditaments already purchased or taken for the purposes thereof, by virtue and in pursuance of the powers of the said recited acts, or any of them, and as have not been already declared by any of the said recited acts to be considered as part of the works made and done under and by virtue of the said recited act of the 23 G. 3., shall be considered to be included and comprehended in, and governed by all and every of the clauses, matters, and things contained in the said recited acts of the 23d and 24th of the king, so far as the nature and circumstances of the case will admit, save and except so much thereof as relates to exemptions from stamp duties, or to the quantum of rates or tolls to be collected, or as may be by this act, or have been by any other act relating to the said *Birmingham* canal navigations, altered or repealed, as if the same had been described in the said recited act of the 23d G. 3., as part of the works to be made and done under and by virtue of that act. The branch of the canal navigations, made under the powers and authorities contained in the 8 G. 3., passes a short distance through the parish of *Bushbury*, and the junction of the *Birmingham* canal with the *Staffordshire* and *Worcestershire*

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cestershire canal, is at *Autherley*, in the said parish of *Bushbury*, where the company of proprietors have a toll-house, at which part of the rates and tolls to be collected under the said several acts of parliament, and in particular the tolls and duties on boats passing from *Birmingham* to *Autherley*, or passing from any intermediate places between *Birmingham* and *Autherley* to *Autherley* aforesaid, became due and are payable, and were actually paid to the amount of the sum of 1734*l.*, at which the said company of proprietors were rated to the relief of the poor in the rate appealed against; and the said company of proprietors have been rated to the relief of the poor of *Bushbury* and hamlet of *Moseley*, for and upon the rates and duties becoming due and payable within *Bushbury* and the hamlet of *Moseley*, in the same form and upon the same sum as the rate appealed against since the year 1804, and have paid all the rates granted to the overseers of *Bushbury* and the hamlet of *Moseley*, except the rate appealed against.

Marryat, Gurney, and Pettit, in support of the order of sessions, were stopped by the Court.

Scarlett, Denman, Russell, and Manley, contra. The question turns upon the construction which the Court will give to the two acts of the 58 G. 3. and 23 G. 3. The former of these recites, that different works had been done by various acts of parliament which had been of great public utility, and that it being found inconvenient to have so many acts applicable to them, it was desirable to bring them under one system of management; and then enacts, that these respective works shall

shall be, and be considered to be included and governed by the 23 G. 3., and 24 G. 3., so far as the nature of the case would admit, as if they had been described in the 23 G. 3., as part of the works to be made and done under that act. Now, amongst the acts here recited, is found the 8 G. 3.; and it follows, therefore, that the works done under that act, which are those included in the present rate, are to be taken subsequently to the 58 G. 3. to have been, for all purposes, as if made under 23 G. 3. If so, then, as by that act they are to be rated in a special manner, this rate cannot be supported. But it is contended that the canal is to be governed, not by 23 G. 3. only, but by 24 G. 3.; and that that part of 24 G. 3., by which the respective exemptions in 8 G. 3., and 23 G. 3., are kept distinct, shews that the 58 G. 3. cannot have this effect. But there were many reasons why the regulations of 24 G. 3. should be kept alive, independently of parochial rates. The tolls imposed by 8 G. 3. and by 23 G. 3. were different, and the powers to borrow money were different also. The object, therefore, of the legislature was still to keep those powers distinct, notwithstanding the 58 G. 3. Wherever there were inconsistent clauses in the 23 and 8 G. 3., they were to remain distinctly applicable each to its respective canal; but all the provisions of the 23 G. 3., not inconsistent with any clause in 8 G. 3., were to govern the canal made under that act. Then, as there is no clause in 8 G. 3. making that canal rateable in any way, the clause giving a special mode of rating, which exists in the 23 G. 3., may well stand as being perfectly consistent with all the other clauses in the 8 G. 3. Besides, in the 58 G. 3. there is an exception; for the works are to be governed by the 23d and 24th, as if they had been described in
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23 G. 3., except as far as relates to exemptions from stamp duties, or to the quantum of the tolls to be collected. Then it follows, that for all other purposes the whole canal is to be governed by 23 G. 3.: if so, this order of sessions cannot be supported.

ABBOTT C. J. I am clearly of opinion, that the question proposed to us by the court of quarter sessions should be answered in the negative, and that the order of sessions should be confirmed. By the case which has been sent to us, it appears that the canal was originally made under the 8 G. 3. c. 38., in which act of parliament there was no express provision exempting the canal from parochial assessments; and it followed, therefore, that by law, that canal was rateable according to its improved value. The inhabitants of the several parishes, therefore, through which that canal passed, had acquired a vested right to have the canal so rated; and a right thus vested in them is not to be divested by loose, equivocal, or general expressions contained in a subsequent act of parliament, introduced by and for the benefit of those very persons who were liable to the payment of the rate. Subsequent to the 8 G. 3. other acts of parliament were passed, one of which, the 23 G. 3., introduced a special provision, as to the mode of rating, more beneficial to the company than that previously established by law. By the 24 G. 3. the two corporations were united, and the names of the corporation changed; subsequently to which the act was passed in the 58 G. 3. for bringing this canal under one system of management. Now that act provides for two distinct objects. It first recites, that doubts had arisen whether the whole and every part of the canals and cuts intended to

be comprized under the name of The *Birmingham Canal Navigations* had been duly incorporated there with; and then enacts, "That all and every the canals, collateral cuts, and navigable communications made by the company of proprietors of The *Birmingham Canal Navigation*, under all or any of the acts therein recited, shall, from the time of the making thereof respectively be and be deemed, taken, and considered to be as part, parcel, and member of The *Birmingham Canal Navigation*." The doubt, therefore, which was recited in the preamble, was thus removed by the enacting clause. The preamble proceeds to state a further object, which manifestly was the extension of the system of management on the part of the company of proprietors; but such a system of management is entirely distinct from the charges imposed by law. The words of the act of parliament are, That it is highly expedient to extend one system of management to the whole canal in such way as to render the same more simple, and to alter such parts of the former system as are by experience found improper, or are by circumstances found unavailing. Now, had it stopped here, it would, in my opinion, have been perfectly clear that the system of management there spoken of was a system of management by the company of proprietors themselves. But what follows puts that out of all doubt; for the preamble proceeds thus, "And particularly to empower the said company of proprietors to contract," &c. : so that the particular management alluded to in the preamble is a portion of a system of management by the company of proprietors, which shews what the meaning of the words in the former part of the preamble must be. This being the object stated in the preamble, the enacting clause follows in very
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general words ; and it states, “ That all and every such part and parts of the said canals, collateral cuts, and navigable communications, and the lands, buildings, tenements, and hereditaments, purchased or taken for the purposes thereof, by virtue and in pursuance of the powers of the said recited acts, or any of them, and as have not been already declared by any of the acts therein recited, to be considered as part of the works made and done under and by virtue of the 23 G. 3., shall be and be considered to be included, comprehended in, and governed by all and every the clauses, matters, and things contained in the 23d and 24th G. 3., so far as the nature and circumstances of the case will admit, as if the same had been described in the 23 G. 3., as part of the works to be made and done under and by virtue of that act.” Now it appears to me, that those general words must, in sound construction, and according to all the rules of criticism, have reference to the object which the legislature had in view, viz. the system of management by the company of proprietors, and that these canals, &c. are only so far included, comprehended in, and governed by the recited acts, as far as that system of management is concerned. There is, however, an exception which I have passed over, in reading the clause, and which appears to me to furnish the only legitimate argument in favour of the construction now contended for by the company. That exception is this, “ Save and except so much thereof as relates to exemptions from stamp duties, or to the quantum of rates or tolls to be collected, or as may be by this act, or have been by any other act relating to the said *Birmingham* canal navigations, altered or repealed.” Part of this exception, it seems to me, was reasonably

introduced, to obviate a doubt which might exist, whether, by placing the different parts of the canal under one system of management, it did not follow, that the company could only charge one rate through the whole: the other objects of this exception I do not so clearly see. In every act of parliament, however, there are many words introduced by the legislature pro majori cautelâ, and to prevent doubts. However, it is quite clear, that an exception, though it may restrain, can never enlarge the words of a grant, and here the words are so plain as in my opinion not to admit of any reasonable doubt. We should be doing great injustice to the legislature, to suppose that they intended to take away a benefit vested, without expressing such intention in clear and unequivocal language. One single word, the word "rated," would have removed all doubt. But, in the absence of that, I do not consider myself justified, in giving the effect contended for to the general words used in this clause.

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BAYLEY J. I am of the same opinion; and I think this a very plain case, and that it falls neither within the mischief intended to be provided against, nor within the words of the enacting clause of the 58 G. 3. By the 8 G. 3. there was created, what, for the purposes of this case, it may be convenient to call the *Bilston* Canal Company. By the 23 G. 3. the *Fazeley* canal company was created: and these two companies remained distinct till the 24 G. 3., by which they were incorporated by the name of The *Birmingham* Canal Navigation, and there never was any doubt that that was a valid and complete incorporation. Now between the 24 G. 3. and the 58 G. 3. many works were done, and in my opinion both the preamble and the enacting clause

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clause shew that it is to these works alone, that the clause in the 58 G. 3. applies. The preamble recites that doubts had been entertained. Now there are no doubts as to the works done under the 8th, but there might be doubts as to those subsequent to the 24th G. 3. The preamble then goes on to state that it is expedient to extend one system of management to the whole: now no ingenuity can suggest that this question, as to the rating, falls within the mischief there assigned. For the rating has no relation to the system of management there stated. There the enacting clause applies only to canals, collateral cuts, and navigable communications, made by the *Birmingham* canal navigations: now no canals had been made by the *Birmingham* canal navigations, till after the 24 G. 3. The clause, therefore, can only apply to works subsequent to that period; for how could it be necessary to enact that those made under the 8th or 23d G. 3. should be deemed to be part of the *Birmingham* canal navigation, inasmuch as no one could doubt that. Then the subsequent part of the clause states that the said canals, &c., (meaning, as I apprehend, those made after the 24 G. 3.,) should be included in, comprehended, and governed by the 23d and 24th G. 3. It seems to me, therefore, that the 58 G. 3. does not apply to the present question, which is, as to the rateability of the canal, made under the 8 G. 3. By that act the parish had a vested right which could not be taken away from them without words clearly and unequivocally shewing such an intention in the legislature. I think, therefore, that the order of sessions was right.

HOLROYD J. I am also clearly of opinion, that the order of sessions ought to be affirmed. The
statute

statute 58 G. 3. recites the purposes for which it was made. Now one rule for the construction of an act of parliament, where general words are used, is laid down by Lord *Coke*; and it is this: "Acts of parliament are to be so construed, as no man that is innocent or free from injury or wrong, be by a literal construction punished or endamaged." (a) Here, if we were to construe the 58 G. 3. according to the letter, (supposing the argument to be well founded, that the clause refers to the whole navigation, which is doubtful,) we should in that case deprive the different parishes of their vested rights, and so punish or endamage innocent persons, who were not within the contemplation of the act. And as to the exception, I fully agree with my Lord C. J. for the reasons which he has given, that it makes no difference. I think, therefore, that we ought not to adopt a literal construction of this clause, in the 58 G. 3., and that the sessions have, in this case, come to the right conclusion.

BEST J. If we were to decide in this case against the order of sessions, we should be taking away a vested right without authority of law. The company of proprietors in this case after having made considerable profits for many years, now seek an exemption from those charges which the law has hitherto imposed upon them; but it is impossible to suppose that the legislature could have intended to grant them this exemption, without having distinctly stated such to have been their intention. Upon looking at the preamble and the enacting clause of the 58 G. 3., it appears to me,

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(a) 1 *Inst.* 360. a.

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that they have only reference to matters of internal regulation, and are not intended to affect the rights of third persons. The exception cannot extend the words of the enacting clause, and as those do not (as it seems to me) include the present case, the exception cannot affect it. I think, therefore, that this canal still remains, as far as its rateability is concerned, under the 8 G. 3., and therefore, that the order of sessions is right, and ought to be affirmed.

Order of Sessions affirmed.

Saturday,
May 15th.

The KING against The Inhabitants of HUGGATE.

Where a pauper was bound apprentice to a certificated man, and during his apprenticeship, he being of the age of 18, his father gained a new settlement; and the pauper did not return to his father's house till after he was 21: Held that he was not emancipated, and that his settlement followed the new settlement of his father.

TWO justices, by their order, removed *Mary, Elizabeth, and Jane*, the children of *Thomas Lazenby*, from the parish of *Nunburnholme* to the parish of *Huggate*. The sessions, on appeal, confirmed the order, subject to the opinion of this Court, on the following case:

The paupers removed were the legitimate children of *Thomas Lazenby*, and had gained no settlement in their own right. *Thomas Lazenby*, the father of the pauper, was originally settled in *Huggate*, where his father rented a farm. During the time that *William Lazenby*, the father of *Thomas Lazenby*, so rented the farm at *Huggate*, the latter was bound out apprentice till the period of his coming of age. The master, during the whole of the apprenticeship, resided at *Spaldington*, under a certificate, at which place the apprentice served him until the expiration of the term. About the middle of the apprenticeship, *William Lazenby* took
another

another farm of 80*l.* a-year, at *Storthwaite*, where he went to reside, and continued there during the remainder of his son's apprenticeship, and after it expired. He found his son, the apprentice, with clothes, except shoes and aprons, during the apprenticeship. *Thomas Lazenby* occasionally visited his father during that time ; and, on one occasion, when he was ill, went to reside with him there for a fortnight, during his illness. At the time when *William Lazenby* went to reside at *Storthwaite*, *Thomas Lazenby* was between eighteen and nineteen years of age, and when the apprenticeship expired, he went home for one night, and a supper was provided by his father at *Storthwaite* for him that night. The next day he went away, and went to work at various places for himself, but never gained any settlement by so doing.

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Coltman, in support of the order of sessions, contended, that *Thomas Lazenby* was emancipated, and did not follow his father's settlement in *Storthwaite*. Here the pauper had contracted an obligation to serve the master, inconsistent with his remaining part of his father's family ; and this is distinguishable from *Rex v. Edgeworth (a)*, for there the indenture was void, and the master had, consequently, no controul over the pauper. But here the controul of the master is perfect, and the only thing is, that no settlement is gained. This is like *Rex v. Walpole, St. Peter's. (b)* There the soldier contracted an inconsistent relation, but acquired thereby no settlement. Besides, here, *Thomas Lazenby* never returned to his father's family till after twenty-

(a) 3 T. R. 353.

(b) Burr. S. C. 638., and 2 Bott. 35.

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one. He also cited *Rex v. Tottington-lower-End* (a), and *Rex v. Woburn*. (b)

Nolan and *I. Williams*, contra, were stopped by the Court.

BAYLEY J. It seems to me, that in this case, *Thomas Lazenby* was not emancipated. He is bound apprentice to a certificated person, and consequently could not, by such service, gain any settlement. Unless he does so, his domicile continues to be his father's house, and he is liable to be removed thither at any time. If, indeed, he had withdrawn himself from his father's family after twenty-one, no doubt it would be an emancipation from that period. But a separation, whilst under twenty-one, does not produce that effect, unless a subsequent settlement be gained. Here none was gained; and, therefore, his settlement shifted to *Storthwaite*, with that of his father. The order of sessions is, therefore, wrong, and must be quashed.

HOLROYD J. In *Rex v. Witton-cum-Twambrookes* (c), Lord *Kenyon* enumerates the modes of emancipation; but this case does not fall within any one of them.

BEST J. concurred.

Order of Sessions quashed. (d)

(a) *Cald.* 284., and 2 *Bott.* 37.

(c) 3 *T. R.* 355.

(b) 8 *T. R.* 483,

(d) *Abbott C. J.* was at *Guildhall*.

1819.

WHITEHEAD *against* PHILLIPS.*Monday,*
May 17th.

COMYN moved, in this case, to set aside the proceedings which had been instituted against the bail, and which were quite regular; and the only question was, on what terms he should obtain the rule. It appeared that a trial had been lost; but the bail, having rendered their principal, he contended, that the plaintiff, having thus obtained the security of the defendant's person, it would be giving him a double advantage, if, in addition to this, the bail-bond should also stand as a security: but,

Practice.
Bail-bond stands as a security where a trial has been lost, notwithstanding the bail have rendered the principal.

Per Curiam. There is no distinction between the case where bail above have been put in and perfected, and that of a render. They must, therefore, follow the same rule; and it is a matter of course that, a trial having been lost, the proceedings can only be stayed upon the terms of the payment of costs, and the bail-bond standing as a security.

Rule accordingly on these terms.

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Monday.
May 17th.

THOMAS and Another, Assignees of THOMAS HOULBROOKE, *against* Sir FRANCIS DESANGES, Knt. and Another.

Where the sheriff took possession under a fieri facias, and at a later hour of the same day the defendant surrendered in discharge of his bail, and afterwards lay in prison two months, and thereby committed an act of bankruptcy; and, by the statute of *James*, was a bankrupt from the time of his arrest: Held that in an action by his assignees to recover the value of such goods, the Court would notice the fraction of a day; and, therefore, that the sheriff having entered before the bankrupt had surrendered in discharge of his bail, the assignees were not entitled to recover.

TROVER by plaintiffs, as assignees of *Houlbrooke*, a bankrupt, against the defendants the Sheriff of *Middlesex*, to recover the value of goods taken by the defendant under a fieri facias against the bankrupt.

This cause was tried at the sittings in *London*, in this term, before *Abbott C. J.*, when it appeared that the act of bankruptcy, on which the commission was founded, was a lying in prison more than two months. The bankrupt was surrendered in discharge of his bail, on the 1st of *June*, 1818, between six and eight o'clock in the evening; and on the same day, between one and two o'clock in the afternoon, a writ of fieri facias was delivered to the defendants, who, by their officer, entered into the bankrupt's premises, and seized the goods. The bankrupt lay in prison more than two months afterwards. It was insisted, on the part of the plaintiff, that the act of bankruptcy having been committed on the same day that the goods were taken in execution, the plaintiffs must, in law, be considered as having the property of the goods vested in them, during the whole of that day, because there could not be a fraction of a day. *Abbott C. J.* thought that the Court might notice the fraction of a day, in this case, and nonsuited the plaintiffs.

Minchin now moved to set aside the nonsuit. The act of bankruptcy, in this case, is founded on the stat.

21 *Jac.*

21 *Jac.* 1. c. 19. s. 2., which enacts, That when a trader on being arrested for debt shall, after arrest, lie in prison two months, or more, upon that or any other arrest, or detention in prison for debt, he shall, be accounted and adjudged a bankrupt, to all intents and purposes; and in the case of arrest, or lying in prison for debt, from the time of the first arrest. It has certainly been held in cases where the act of bankruptcy consisted of a denial to a creditor, that when the execution and act of bankruptcy were on the same day, it was open to enquire which had the priority, *Ex-parte Dobree* (a), *Sadler v. Leigh*. (b) But in the present case, the act of bankruptcy rests on the insolvency of the trader. In *Rose v. Green* (c), Lord Mansfield says, "The bankruptcy relates only to the time of the surrender. The most substantial trader is liable to be arrested; and the mere being arrested is no presumption of insolvency. The presumption from his lying in prison two months without being able to get bail is a very strong one." *Ex-parte Bowes* (d), also, is an authority to the same effect. If the insolvency be the criterion, a person who is so totally insolvent in one part of the day as to be surrendered in discharge of his bail, cannot be held to be solvent at a prior part of the same day. In the case of *Glassington and Others v. Rawlins* (e), it was held, "That the day on which the arrest was made, or the party surrendered in discharge of his bail, was to be included in the reckoning." A commission might therefore have issued against the bankrupt at the opening of the office, on the morning

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 against
 DEANES.
(a) 8 *Ves. jun.* 82.(b) 4 *Campb.* 197.(c) 1 *Burr.* 437.(d) 4 *Ves. jun.* 168.(e) 3 *East*, 406.

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against
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of the fifty-seventh day after the surrender, although, if the Court were to look at the fraction of the day, the act of bankruptcy would not be complete until a particular hour in the evening of the same day.

ABBOTT C. J. I was of opinion at the trial, and still continue so, that as it respects the interests of third persons, the day ought to be divided.

BAYLEY J. I think a fraction of a day must, in this case, be allowed. Until the surrender in discharge of his bail, the bankrupt might have legally disposed of his property; and as the property, at the time of the seizure by the defendants, was not divested from the bankrupt, the assignees cannot recover it.

HOLROYD and BEST Js. concurred.

Rule refused.

Monday,
May 17th.

CHAPMAN *against* BLACK.

A bill of exchange, affected by usury, being in the hands of an innocent holder. The latter, on being informed of the usury, takes a fresh bill in lieu of it,

drawn by one of the parties to the original usury, and accepted by a third person, for the accommodation of the other party: Held, that he cannot maintain an action against the acceptor of this substituted bill.

THIS case was argued on a former day in this term by *Topping* and *Lawes* for the plaintiff, and *Marryat* for the defendant. For the plaintiff were cited *Barnes v. Hedley* (a), *Daniel v. Cartony* (b), and *Parr v. Eliason* (c); and for the defendant were cited *Tate v. Wellings* (d), *Cuthbert v. Haley* (e), and *Lowe v.*

(a) 2 Taunt. 184.
(d) 3 T. R. 538.

(b) 1 Espinasse, 274.
(e) 8 T. R. 390.

(c) 1 East, 92.

Maxaredo.

Mazaredo. (a) The action was on a bill of exchange, drawn before the passing of the 58 G. 3. c. 93. (b)

Cur. adv. vult.

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ABBOTT C. J. now delivered the judgment of the Court.

This was an action upon a bill of exchange for 40*l.* drawn by one *Akers* upon the defendant, and accepted by him. The defendant pleaded the general issue. At the trial before me, it appeared that one *White* having occasion to borrow money, applied to *Akers*, who said he was willing to discount bills for him, if he procured the acceptance of the defendant. *White* did accordingly procure the acceptance of the defendant to two bills of 25*l.* each, drawn by *White*, payable to his own order at two months, and indorsed them to *Akers*, who discounted them, deducting 8*l.*, a sum far exceeding the legal interest. When these bills became due, *White*, being unable to take them up, and being in possession of a bill drawn by him to his own order for 40*l.* upon one *Paterson*, who owed him that money, indorsed this bill, and placed it, together with a sum of 20*l.*, in the hands of the defendant for the use of *Akers*, who was to give him (*White*) the difference; *Akers*, accordingly, did give *White* the difference, deducting 5*l.* as discount upon the 40*l.* bill, which

(a) 1 *Stark*. 385.

(b) By the 58 G. 3. c. 93. it is enacted, " That no bill of exchange, or promissory note, although it may have been given for a usurious consideration, or upon a usurious contract, shall be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration, or upon a usurious contract.

had

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had then about two months to run. This bill for 40*l.* afterwards came into the hands of the plaintiff, without notice of the usury between *Akers* and *White*; it was not paid when at maturity; the plaintiff was then informed of the usury: he complained it was hard that the loss should fall upon him; and then it was agreed among the parties, that the plaintiff should have a new bill, to which the name of *White* should not appear, and in furtherance of this agreement the bill in question was drawn and accepted.

I nonsuited the plaintiff at the trial, upon the authority of *Lowes v. Mazaredo*, considering it to be settled by that case, that the present plaintiff could not have sued either *White* or *Paterson*, upon the first 40*l.* bill, because he must make title through the indorsement of *White*, which was vitiated by the usury with *Akers*, and thinking he could have no remedy upon the substituted bill against any person, whom he could not have sued upon the original bill; and considering also, that the present defendant, who had accepted for the accommodation of *White*, stood in the same situation as *White* himself. Leave was given the plaintiff to move the Court to set aside the nonsuit, and enter a verdict for him; such a motion was made, and cause was shewn; and the point debated in the present term, before my Brothers *Holroyd*, *Best*, and myself. And upon consideration, we are of opinion that the nonsuit was right. The case of *Lowes v. Mazaredo* being subsequent to *Parr v. Eliason* and *Daniel v. Cartony*, both of which were there cited, must, in our opinion, be taken as furnishing the rule of law upon this subject; more especially, as the law has since been altered by a statute, passed, probably, in consequence of the decision of that

very

very case; but which statute will not reach the present transaction. Then, as the plaintiff could not have sued *White* upon the first bill for 40*l.*, can he sue the defendant, who represents *White* on the present bill? We think he cannot. The case of *Tate v. Wellings* shews that a substituted security generally stands in the same situation as the original. Indeed, if it were otherwise, the statute of usury might, in many cases, be easily evaded by a little prolongation of time, and multiplication of securities. The case of *Cuthbert and Others v. Haley* was cited for the plaintiff, but it is very different from the present. The plaintiffs in that case, who were bankers, had received from one *Plank*, a customer, several promissory notes made by the defendant; these not being paid when due, he gave the plaintiffs a bond for the amount; and to an action brought upon the bond, he pleaded that the bond was given to secure money lent to him by *Plank* upon usury. In fact, *Plank* had taken usurious interest upon discounting the notes for the defendant, but the plaintiffs were ignorant of that fact, not only when they took the notes from *Plank*, but also when they received the bond from the defendant. Here, the plaintiff was informed of the usury before he took the bill in question; and being informed of it, instead of having recourse to *Akers*, or the person from whom he had received the first 40*l.* bill, either by suit on the bill, if that could be done, or by reclaiming the consideration which he had given for it, which, undoubtedly, might have been done; he makes himself a party to a fresh bill, from which the name of *White* is studiously omitted, in order to cover the transaction; and if he be allowed to recover upon this bill against the present defendant, he will thereby enable

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enable *Akers* to keep the unlawful interest he has received from *White*: and this effect was known to him at the time of his taking the bill; whereas no such effect was known to or contemplated by Messrs. *Cuthbert* when they took the bond from *Haley*; but they took the bond for their own security only, and without reference to any other object. For these reasons, we, who heard the argument, think that the rule for setting aside the nonsuit must be discharged.

Rule discharged.

LAUNOCK *against* BROWN and Others. (a)

In the execution of criminal process against any man in the case of a misdemeanor, it is necessary to demand admittance, before the breaking of the outer door of the house can be legally justified. Quere, if so in the case of felony.

TRESPASS for breaking and entering plaintiff's dwelling-house and seizing a gun. Plea, not guilty. At the trial at the last spring assizes for the county of *Hants*, before *Holroyd* J., the defendants, two of whom were constables, and the third the game-keeper of the manor where the plaintiff resided, justified the trespass under a warrant granted by virtue of the stat. 22 and 23 *Car.* 2. c. 25. s. 2., which empowers game-keepers and other persons, authorized by warrant under the hand and seal of any justice of the peace for the county, in the day-time to search the houses of unqualified persons suspected of having in their custody guns, &c. for the purpose of destroying game; and to seize, detain, and keep the same, to and for the use of the lord of the manor, or to cut to pieces and destroy them. The plaintiff was proved to be an

(a) This case was moved within the first four days, but, by accident, was omitted to be inserted in its proper place.

unqua-

unqualified person ; but on the warrant being produced several objections were taken to it as being informal. And it further appearing that the outer door of the plaintiff's house had been broken open, without his having been previously requested to open it, the learned Judge was of opinion that the justification was not sufficiently made out, and the plaintiff obtained a verdict. And now,

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Pell Serjt. moved for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered. He contended that the defendants were justified in obeying the warrant; and that if the warrant was informal, the proper remedy of the plaintiff was not against them, but against the magistrate who had granted it. Then, as to the other objection, that the outer door was broken open, he contended that here there appeared to have been a misdemeanour on the part of the plaintiff; and that, in the execution of criminal process, the outer door may be lawfully broken open. If a previous request be held to be necessary, it will be very inconvenient; for in many criminal cases, as, for instance, felony, it will give the party accused notice that he may make his escape.

ABBOTT C. J. I am of opinion that, in this case, the verdict is right. It is not at present necessary for us to decide how far, in the case of a person charged with felony, it would be necessary to make a previous demand of admittance before you could justify breaking open the outer door of his house; because, I am clearly of opinion that, in the case of a misdemeanour, such previous demand is requisite; and that is sufficient for the deter-

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Laugher
against
Barnes.

determination of the present case. It is reasonable that the law should be so; for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost.

BAYLEY J. The present verdict is quite right; because, even in the execution of criminal process, you must demand admittance before you can justify breaking open the outer door. That point was mentioned in the judgment of the Court, in the case of *Burdett v. Abbott*. (a)

HOLBOYD and BEST Js. concurred.

Rule refused.

(a) 14 East, 163.

Tuesday,
May 18th.

THEOBALD against CRICKMORE.

It is not necessary, in case of a trial by proviso, after a lapse of four terms, without any proceeding, to give a term's notice.

THIS was an action of trespass tried at the *Essex* Summer assizes, 1817, when the plaintiff obtained a verdict. The defendant, in *Michaelmas* term following, obtained a rule nisi for a new trial, which was made absolute in *Hilary* term, 1818. No further proceedings were had until the 23d *February*, 1819, when the defendant served the plaintiff with a rule for a trial by proviso; and on the 28th *February*, the defendant also served the plaintiff with notice of trial for the ensuing assizes. The record was taken down by proviso. The plain-

plaintiff did not appear, and was nonsuited. The defendant had not given a term's notice of his intention to proceed. A rule having been obtained for setting aside this verdict for irregularity, on the ground that the defendant had not given a term's notice of trial,

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Walford now shewed cause. The rule requiring a term's notice, after a lapse of four terms, does not apply to the case of trial by proviso. In fact, there is no written rule of Court on the subject. It is certainly the practice as against plaintiffs. The practice of applying for judgment, as in case of a nonsuit, has, in modern times, been substituted for the trial by proviso; and in *Doe v. Moses* (a), and *Manby v. Wortley* (b), it was decided that the rule, requiring a term's notice of proceeding, does not extend to a motion for judgment as in case of a nonsuit.

Chitty, contra. It is laid down in *Tidd's Practice*, 820., that the defendant, on a trial by proviso, must give the like notice to the plaintiff, as the plaintiff would have been obliged to give to him, and *Hachell v. Griffiths* (c), *Ashwin v. Corbill* (d), are authorities to this effect. The reason assigned for the rule by Lord *Ellenborough* C. J. in *May v. Wooding* (e) is, that while the matter is still in controversy, the party should, after so long a lapse as four terms, without any proceedings, have notice that he may prepare himself; and that reason applies as well to a plaintiff as to a defendant.

ABBOTT C. J. The practice of moving for judgment, as in case of a nonsuit, is now generally substituted

(a) 5 T. R. 634.

(b) 2 Black. 1224.

(c) 2 Salk. 646.

(d) 2 Salk. 650.

(e) 3 M. & S. 500.

for

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for that of trial by proviso. It has been decided, that a term's notice is not requisite, before moving for judgment as in case of a nonsuit; and I think that a similar practice ought to prevail in this case.

Rule discharged.

Tuesday,
May 18th.

BELL *against* THRUPP.

An affidavit to hold to bail, stating that defendant was indebted to plaintiff, for goods sold and delivered by the plaintiff for the defendant, is insufficient; because it did not appear that the goods were sold and delivered to the defendant.

THE affidavit to hold to bail stated, that the defendant was indebted to the plaintiff for goods sold and delivered, materials found and provided, and work and labour done and performed by the plaintiff for the defendant.

Chitty had obtained a rule nisi for discharging the defendant out of custody on filing common bail, on account of the insufficiency of the affidavit; which stated that the goods were sold and delivered for instead of to the defendant.

Littledale shewed cause, and distinguished this from *Cathrow v. Hagger* (a), where the affidavit stated that the defendant was indebted to the plaintiff for goods sold and delivered to him the defendant, and it was omitted to add *by the plaintiff*; but here the words are, "goods sold and delivered by the plaintiff for the defendant," which is an immaterial variation.

But the Court said, that an affidavit to hold to bail, which was to have the effect of depriving a party of his liberty, should be framed in most precise and positive words; and they held the objection well founded.

Rule absolute.

(a) 8 East, 106.

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The HIGHGATE Archway Company *against*
NASH.

Tuesday,
May 18th.

THE plaintiffs having brought an action against the defendant upon a bond, all matters in difference between the parties were referred to an arbitrator; and by the rule of reference, the costs of the cause were to abide the event of the award. The arbitrator awarded, that the verdict should finally stand for the plaintiffs for 3000*l.* damages; but he further directed, that the plaintiffs should not take out execution for that sum until they should have paid the defendant a sum exceeding both the damages and costs, which the plaintiffs were indebted to the defendant, upon another account. The plaintiffs' attorney entered up judgment and issued a fieri facias for the debt and costs, but indorsed to levy the costs only, although the 15,000*l.* had not been paid. Upon these facts, disclosed in affidavits, a rule nisi had been obtained for setting aside the execution with costs. And

By rule of Court a cause and all matters in difference were referred to an arbitrator, and the costs of the cause were to abide the event. The arbitrator directed the verdict to be entered for the plaintiffs; but that they should not take out execution for the debt until they had paid a larger sum due to the defendant: Held that the plaintiff's attorney might still take out execution for the costs.

Scarlett and *Walford* now shewed cause. By the rule of reference, the costs were to abide the event; and whatever the award might be, the costs followed as a necessary consequence of the event. If the action had proceeded, and the plaintiff had recovered judgment, the Court would not allow the debt and costs to be set off against the judgment obtained by the defendants until the attorney's lien was satisfied, *Middleton v. Hill*. (a) If this application were to succeed, the attorney might be altogether deprived of his costs.

(a) 1 M. & S. 240.

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HIGHGATE
Archway Com-
pany
against
NASH.

F. Pollock, contra. The costs are part of the damages, *Deacon v. Morris*. (a) Execution, therefore, cannot be taken out for the one without the other; and as the arbitrator has expressly prevented the plaintiff from taking out execution for the debt, it follows that he cannot take out execution for the costs, and therefore this is a breach of the award. The execution, too, is for the debt and costs, which is a direct breach of the award; although the indorsement, it is true, is only to levy the costs. That will be an irregularity, because the execution will not correspond with the judgment.

ABBOTT C. J. The costs follow as a legal consequence of the award; and the writ of execution, though taken out for the debt and costs, is only indorsed to levy the latter, and is, therefore, no breach of that award. For although in case there had been cross-actions the defendant would have been entitled to have set off one judgment against the other, he would still have been liable to the costs of the plaintiffs' attorney.

Rule discharged.

(a) Ante, 393.

Tuesday,
May 18th.

KEY against HILL.

The assignee
of a bail-bond,
without any
sufficient reason
for so doing,
brought sepa-
rate actions against each of the bail. The Court, upon payment of the costs of one action only, stayed the proceedings in all. Dissentiente Abbott C. J.

A RULE having been obtained on a former day, in this term, to stay the proceedings in three actions on the bail-bond, taken in this cause, upon pay-

ment

ment of the costs of one action only; bail above having been put in and justified,

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Comyn now shewed cause. A bail-bond is not to be distinguished from any other joint and several bond, where the obligor has a right to sue all the parties separately. The statute 4 & 5 *Anne*, c. 16. s. 20., enables the assignee of the bond to sue, whereas, at common law, the sheriff only could put it in suit. The act certainly enabled the Court to give such relief to the defendant and to the bail as was consistent with justice and reason. The invariable practice, since the passing of that act, where several actions have been brought, is, to stay the proceedings, upon payment of the costs, in all the actions; and this practice of bringing several actions has been the subject of great complaint, and has frequently been reprobated by the Court; but no application of this sort has ever yet been made, and that of itself affords the strongest argument against it.

E. Lawes, contra. The statute of *Anne* enables the Court to give to the bail such relief as is consistent with reason and justice. It is most consistent with reason and justice, that they should be relieved from the costs of three actions, where no reason can be assigned for bringing more than one. Cases may occur, where, perhaps, several actions would be proper, but no necessity is suggested for such a proceeding here; and, as the debt might have been recovered in one action, it is inconsistent with reason and justice, that the bail should be subjected to the costs of three.

ABBOTT C. J. This act of parliament has now been in force for more than a century, and in the course of

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against
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that time, it has very often occurred to this Court, to express its most marked disapprobation of the practice of bringing several actions upon the bail-bond given to the sheriff. But no instance can be found in which the Court has, on such an occasion, stayed the proceedings, on payment of the costs, in one of those actions only. The act seems, undoubtedly, to have contemplated only one action, for the words are, "that the sheriff shall assign to the plaintiff the bail-bond, or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal. And that if the said bail-bond or assignment, or other security taken for bail, be forfeited, the plaintiff, after such assignment made, may bring an *action and suit* thereupon in his own name." But I think, that by these words, a plaintiff is not to be confined to one action only; for there may be cases, where it may be very reasonable, that more than one action should be brought upon the bail-bond; as where the plaintiff has brought an action against one only, and that one becomes unable to pay, it would be unreasonable to say, that he should not then proceed against one of the others. So that it appears to me, that under this part of the statute, it is competent for such plaintiff to bring more actions than one. The act then goes on to state, that the Court where the action is brought may, by rule of Court, give such relief to the plaintiff and defendant in the original action, and to the bail upon the bond, as is agreeable to justice and reason; and that such rule of Court shall have the nature and effect of a defeazance to such bail-bond. Now it seems to me, that the meaning of this is, that the Court is to give such relief against the forfeiture of the bond as is reasonable.

sonable. Where, for instance, bail above, though not put in and perfected in due time, have, notwithstanding, been put in and perfected within a few days after, it is consonant to justice and reason, that the party should be relieved from the forfeiture of the bond. This view of the statute appears to be corroborated by what follows; for the rule of Court is to have the nature and effect of a defeazance to the bond, which shews that the relief before spoken of is a relief against the forfeiture of the bond. But I do not think that this extends so far as to give the Court the power to relieve the party applying, against the costs which have been incurred by the plaintiff in bringing more than one action. The question is now agitated before the Court for the first time, and they are now called upon to pronounce their judgment on the words of this statute. I do not feel myself at liberty to say, that the Court can deprive the plaintiff of his costs, although I am sorry, under the circumstances of this case, to come to such a conclusion. No such construction as that now contended for, was originally put upon this act of parliament; and I cannot think, therefore, considering how often the subject has been before the Court, that it could have escaped notice, if it had been the correct one. I think, therefore, that this rule should be discharged.

BAYLEY J. The practice which has been pursued in this case, of bringing many actions on one bail-bond, is certainly most oppressive, and, if the Court are unable to grant relief under this statute, it calls most imperiously for the interference of the legislature. The fact of the oppression in this particular instance does not

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furnish of itself any ground on which the Court can act. But it may induce us to put such a construction on the words of this statute, if they are capable of it, as may prevent such oppression in future. By the common law, no action could have been brought upon the bail-bond by any person but the sheriff. This statute first made a bail-bond assignable, and enabled the plaintiff in the original action, after such assignment, to bring an action or suit. Now I lay no stress on the words "an action" being used. For it seems to me, that by the subsequent words of the clause, if the plaintiff brings more than one action without any ground for so doing, that the Court is not only warranted, but bound to give such relief as is agreeable to justice and reason. Where a party brings more than one action upon a bail-bond, and an application is made to this Court, for such relief as is agreeable to justice and reason, it seems to me that the Court may properly ask of the plaintiff why he has brought more than one action. If he can assign any good reason for so doing, then it will be fit that he should have the costs of such actions as he might reasonably bring. But if it appears that he has brought more actions than one, merely for the purpose of getting costs, then I think the Court ought to reprobate such conduct, and to do so, by confining his claim to such costs only as were necessarily incurred to obtain the real and substantial purposes of justice. I am of opinion, that where a plaintiff, as in this case, can give no reason for bringing more than one action, both justice and reason require that the Court should give relief upon payment of the costs in one action only, and therefore that this rule should be made absolute.

HOLROYD

HOLROYD J. The only doubt which I have had in this case is, whether we are precluded, by the practice which has prevailed so long, from relieving this party under the clause in question, on payment of the costs in one action only. The usage has certainly been for parties to obtain relief on payment of all the costs which have been incurred. Had that practice been sanctioned by any decided case, I should have held myself bound by it, and thought that the only mode which the Court could adopt would have been to have prevented this practice by a prospective rule; and my doubt has been, whether that was not the better course to adopt on the present occasion. But on the best consideration which I can give to the subject, I think that as there has been no express decision on the point, although the practice has been to the contrary, we are still at liberty to grant such relief under this act of parliament as justice and reason require. And, as it appears in this case that several actions were not necessary, and no reason has been assigned why more than one was brought, I think we may, consistently with justice and reason, stay the proceedings on payment of costs in one action only.

BEST J. If there had been a settled practice on this subject, I should have felt myself bound by it; but on enquiry, it appears that, as yet, there is no judicial decision pronounced on the subject. The practice, therefore, which has prevailed, has never yet been sanctioned by the Court. It certainly is an abominable practice, and we are now called upon, for the first time, to say, whether we will assent to it. The words of the act of parliament are "that the Court may give such relief

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as is agreeable to reason and justice." Now these words ought to have the largest possible construction given to them, for the purpose of advancing that justice which the legislature had in view. And, putting that construction on the word, we are to consider whether, in this case, it was fit that several actions or one only should have been brought. If the former, then undoubtedly we ought not to stay the proceedings, unless on payment of all the costs incurred. But if the latter, then, as clearly, we ought to stay them on payment of such costs only as were, in our judgments, necessary to have been incurred. There is only one case, in which, as it seems to me, it can be proper to bring more than one action, which is the case where one of the bail cannot be served with a writ. But here that circumstance does not exist, for it appears that all the bail have been served with process; and the plaintiff might have had exactly the same security by bringing one joint action against all the parties. We are called upon to put a stop to the continuance of this practice, and I therefore fully agree with my Brothers *Bayley* and *Holroyd*, that this rule ought to be made absolute.

Rule absolute.

Wednesday,
May 19th.

The KING *against* The Sheriffs of LONDON, in
PLOMER *v.* HOUGHTON.

Notice of bail
was given by
the defendant's
attorney, and
bail above put
in by an attor-
ney employed by the bail to the sheriff, without any order having been made to change the
attorney: Held that this was sufficient.

IN this case, the attachment issued against the sheriff after bail above had been put in; and *Chitty* having, on a former day, obtained a rule nisi for setting aside

this

this attachment for irregularity, it now appeared that notice of bail had been originally given by the defendant's attorney, and that without any order, for changing such attorney, the bail to the sheriff employed another attorney to put in and perfect bail, who gave due notice of adding and justifying fresh bail, who accordingly did justify. The attorney for the bail, after such justification, and not before, was appointed the defendant's attorney.

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against
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Marryat and Abraham, against the rule, cited *Kaye v. De Mattos* (a), and contended that the notice of bail by another attorney, without an order for changing the former, was a nullity.

Per Curiam. An order to change the attorney is not necessary in this case, as it appears that the attorney who gave notice of the added bail really acted on behalf of the bail to the sheriff. It is of the greatest importance that the bail to the sheriff should be allowed to put in bail above for their own protection, and it is wholly immaterial to the plaintiff by what attorney the notice of added bail was given.

Rule absolute.

(a) 2 Black. 1323.

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Wednesday,
May 19th.

The KING, on the Prosecution of MILLS, *against*
BRICE.

A prosecutor of
an indictment
has no right to
address the
jury, and state
the case for the
prosecution.

THE defendant had been tried and acquitted, at the last *London* sittings, upon an indictment for perjury, and the prosecutor, in person, now moved for a new trial, on the ground that the Lord Chief Justice had refused to allow him to address the jury, and state the case for the prosecution.

Per Curiam. In a criminal prosecution, instituted for the interests of the public, in the name of the king, and not to gratify the objects of an individual, a prosecutor has no right to address the jury. Counsel indeed (who are in some measure under the control of the Court) have this privilege allowed to them; because, from their professional education and habits of business, it is to be expected, that they will not state to the jury any thing but what is fit for them to hear. Besides the prosecutor may be, and generally is, a witness; and it is very unfit that he should be permitted to state, not upon oath, facts to the jury which he is afterwards to state to them on his oath; and *Bayley J.* added, that he remembered a case where Lord *Ellenborough* had allowed the prosecutor to address the jury, and afterwards, on being spoken to on the subject by the other Judges, expressed his conviction that he had done wrong. (a)

Rule refused.

(a) *The King v. Milne and Others.* — In this case the prosecutor, who had been a witness before the grand jury, waived giving evidence in the case before Lord *Ellenborough* would allow him to address the jury. And on the prosecutor moving for a new trial, Lord *Ellenborough* expressed his conviction that even then the prosecutor had no right to address the jury. This was probably the case alluded to by *Bayley J.*

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The KING *against* The Sheriffs of MIDDLESEX, *Friday,*
in the Case of PHILLIPS *v.* DORE. *May 21st.*

ARCHBOLD had obtained a rule to shew cause, why the attachment against the defendants, for not bringing in the body, should not be set aside, with costs, for irregularity. The rule to bring in the body expired on the 8th *May*, on which day the defendant in the action surrendered himself, and was thereupon committed to the custody of the marshal; and, on the same day, notice of the render was given to the plaintiff's attorney. There was no affidavit of the service of the notice of render. On the 11th *May*, the rule for the attachment was obtained.

Practice.
Entry of committitur in marshal's book is not necessary to make a perfect render.

Manning shewed cause, and contended, that the render was not valid on two grounds. First, there was no affidavit of the service of the notice of render filed at the Judge's chambers; and, secondly, that there was no committitur entered in the marshal's book, which was necessary by the rule of Court of *Trin. 3 Anne*, to be done by the defendant; and he cited *Tidd's Practice*, 282.

Archbold, *contra*, contended, that the entry in the marshal's book was unnecessary. The committitur itself is delivered to the marshal; and, in 2 *Burr.* 1049., Sir *James Burrow* states, that that book is a book of no authority whatsoever, and only meant for the marshal's convenience, and the same is laid down in 2 *Sellon*, 36. And notice of the render to the plaintiff's attorney was quite

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MIDDLESEX.

quite sufficient. As to the other objection, he was stopped by the Court.

ABBOTT C. J. It is not essential to a perfect render that there should be an affidavit of the service of the notice of render filed at the Judge's chambers. As to the other point, also, we are at present of opinion, that the attachment is irregular; but if, on consideration, we should alter our opinion, we will mention it again.

On the next day, the Court said, that they had considered the question, and retained their former opinion; and *Bayley* J. added, that Mr. *Tidd* was not borne out by the authorities in the position laid down by him, *p.* 283. The course of practice is this: the bail bring the defendant to the Judge's chambers to be rendered; the Judge makes out the committitur, which, together with the prisoner, is delivered by the tipstaff to the marshal. In the cases referred to by Mr. *Tidd* the committitur is of a different description from the present. They are cases where the prisoner being already in the custody of the marshal, the character of his commitment is changed. There the committitur is filed with the clerk of the judgments, and an entry is made in the marshal's book. Where a prisoner is brought up by habeas corpus from the *Fleet*, in order to be charged in execution in the *King's Bench*, there the committitur is not entered in the marshal's book. In that case, as well as this, the committitur, which is delivered with the prisoner, apprizes the marshal of the character of the commitment, and gives him all the information necessary for his guidance; whereas, in cases where the nature of the commitment is changed, further information to the marshal is essential; and, in those cases, the entry in his book is requisite.

Rule absolute.

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The KING *against* WOOLF.Saturday,
May 22d.

THE defendant, *Woolf* (a), had been adjudged to be imprisoned two years, to pay a fine of 10,000*l.*, and be further imprisoned till that fine was paid. A *levari facias* having issued out of this Court against the defendant, his goods, nearly to the amount of the fine, were taken in execution by the sheriffs of *London*. And now,

Where a defendant, in an indictment for a misdemeanor, has received judgment of fine and imprisonment: Held that a *levari facias* may issue immediately to take his goods in execution for the fine.

F. Pollock moved for a rule nisi to set aside this writ. The only authority which can be found for this proceeding is the case of *Rex v. Wade* (b), reported also under the name of *Rex v. Webb* (c); but this authority, which was decided in the reign of the *Stuarts*, has never been acted upon since. It is observable, that in each of the books it is reported for a different purpose; and the defendant, in that case, does not appear to have been before the court: so that no one was interested in raising this question there. The authority of that case is therefore questionable, and there is no other authority. The practice has never been conformable to it; and there does not seem to be any good reason for the clause of imprisonment "till the fine be paid," if it can be thus levied. Besides, in this case, non constat that this writ has been issued by the crown itself; and, at any rate, it is a harsh proceeding against the defendant, whose goods are seized and sold, without any application to him to pay the money and redeem his goods;

(a) *Ante*, 462.
(c) 2 *Show.* 166.

(b) *Skinner*, 12. *Sir T. Jones*, 185.

and

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and in fact, by a sale of these goods at a loss his fine will be increased.

ABBOTT C. J. The present application is not made on any peculiar circumstances of fact, but only on the ground of the illegality of this writ. If there are any circumstances to shew that it has been issued by an improper person, or without proper authority, or that the mode of levying the fine is more harsh than justice requires, our judgment, which is upon the law only, will not preclude the party from making such special application. On the law, if we entertained any reasonable doubt, we should grant a rule to shew cause; but if we have no doubt, we ought not to do so. It is said that this writ has issued on the authority of a single case in the reign of one of the house of *Stuart*; and we are desired to say, that cases in those reigns are not to be regarded as law. To that, however, I cannot assent. But it is a mistake to say, that this rests only upon the authority of that case; for that case itself rests upon the principles of the common law, that the crown, who represents the public, is entitled to levy for its debts by an united process against the body, land, and goods of its debtors. In this case, however, there has not been any process against the person, the defendant being in execution, not for the fine, but for the term for which the court gave judgment of imprisonment. Many cases of this sort have occurred in the Court of Exchequer within my remembrance. Indeed, the form of the writ of extent itself, which requires the sheriff to take the goods, chattels, lands, and person of the debtor, proves the same rule to exist. Better evidence of the law of the land we cannot expect. The case cited was therefore
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an authority founded upon the general principle of the law; and as by that authority it is laid down that a *levari facias* may issue for a fine due to the king, which is a debt on record, I do not entertain any doubt of the legality of this writ. If it has issued under any improper circumstances, or if it imposed upon the defendant a greater inconvenience than is necessary to insure the payment of the fine, these special circumstances may again be submitted to the Court on a fresh affidavit.

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BAYLEY J. The only question we are to consider is, whether the crown has, or has not, a right to issue a *levari facias* for the debt in question; and upon that, on principle, it seems to me there can be no doubt. Indeed, it is not discussed on principle; but observations are made that this is a new mode of proceeding, and that mischievous consequences would follow from it. I think, however, that mischievous consequences would ensue to the crown and the regular administration of justice, from a delinquent withdrawing all his property from the effect of a judgment; and that the preventing that will not be a mischievous consequence to any one but himself. Here there is a judgment that the defendant do pay to the king a fine of a certain sum. By that judgment the debt becomes a debt to the king, of record; and it is payable to the king *instanter*. It is true, that part of the judgment is also, that if at the expiration of the imprisonment the fine shall not be paid, he is to continue in prison until it be paid; but that is only for a farther remedy on behalf of the crown; and if we were to say, that the crown shall not be at liberty to issue an immediate execution for its own debt, we should place the crown in a worse situation than

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than any subject. The case cited shews that the *levari facias* from this court was the proper mode of proceeding. The king has a right to choose his own court for the purpose of suit; and for the purpose of issuing execution, he may adopt, if he pleases, that court in which the judgment has been pronounced. If this had been estreated into the Exchequer, could not the Exchequer have issued process? If so, why must the crown wait for that, and why may not this court issue it? In *Comyn's Digest*, title *Viscount*, c. 5., it is laid down, that it is part of the duty of the sheriff himself to levy all sums due to the crown. I am therefore of opinion that this writ has properly issued; and I do not see that any inconvenience whatever, which can be legally considered as an inconvenience, will result from it.

HOLROYD J. I am of the same opinion. I think the case cited not only establishes the principle, but that the principle itself is founded on the common law. *Cadmores's* case, cited in *Rex v. Webb*, as determined in *Kelyng's* time, establishes this, that where a party is in execution for a fine, still a writ of *levari facias* lies de bonis et catallis. If, therefore, the defendant here was in execution for the fine, which he is not, still this *levari facias* might issue. I think, therefore, that we ought to refuse this rule.

BEST J. Nothing is more mischievous than to bring into doubt established principles of law. It is an established principle, that the king may have execution against body, land, and goods. That principle is applied to the present case by the *King v. Webb*. I have heard
nothing

nothing to impeach the authority of that case. It is said, that that case was decided in the reign of *Charles* the Second; but if that were an argument, many cases decided by some of the most enlightened Judges, Lord *Hale* and others, would be swept away. I agree, that this is a debt of record, due to the king the instant the judgment is pronounced, and it would be strange to say, where a debt is due, that there is no remedy to recover it for the term of two years. It would be saying, that in proportion to the greatness of the delinquency of the offender, would be the difficulty of recovering the penalty: for the longer the crown is delayed, the greater will be the opportunity given to the defendant of defeating that right. A doubt upon this case might be very mischievous. It does not appear that the whole debt has been levied, and a doubt might stop the exertions of those who are at present endeavouring to recover the whole sum, and might prevent the crown from recovering it, by giving the defendant an opportunity of removing his property out of reach. I am, therefore, of opinion, that this rule should be refused.

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The King
against
Woolf,

Rule refused.

KIRKHAM *against* MARTER. (a)

Friday,
May 21st.

THE declaration stated, that one *T. E. Marter*, before the making of the promise of defendant, had, without the leave or license of the plaintiff, wrongfully ridden a horse of the plaintiff's, in consequence whereof

A. had wrongfully, and without the licence of *B.*, ridden his horse, and thereby caused its death: Held that a promise

by a third person to pay the damage thereby sustained, in consideration that *B.* would not bring any action against *A.*, is a collateral promise within the statute of frauds, and must be in writing. Held, also, that a motion for a new trial, where the cause has been tried during the term, may be made at any time within four days after the distringas is returnable.

(a) We were favoured with the note of this case by a gentleman at the bar.

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the horse died; that the plaintiff had threatened to commence an action against the said *T. E. M.* for the recovery of such damages as plaintiff had sustained, by reason of the premises; and thereupon, in consideration of the premises, and that the plaintiff, at the request of defendant, would not bring any action against the said *T. E. M.* for the cause aforesaid, and that plaintiff would be content to take, for and on account of the said horse, what should be agreed upon between the defendant and one *A. B.* defendant promised to pay plaintiff what should be agreed upon between defendant and said *A. B.*, for and on account of said horse. Averment, that plaintiff had brought no action for the cause aforesaid, and that he was willing to take, for and on account of the horse, what had been agreed upon between the defendant and *A. B.*, and that defendant and *A. B.* did agree that defendant should pay plaintiff fifty guineas for the said horse, and the bill due for the maintenance and keep of the said horse, and that the same should be paid before the then next *Epsom* races. Declaration then averred, that that bill before the then next *Epsom* races was ascertained to amount to a certain sum therein mentioned. Breach, non-payment of the said several sums. Plea, general issue.

The cause was tried on *Thursday*, 13th *May*, at the second *Middlesex* sittings in this term, before *Abbott C. J.*, when the plaintiff proved a verbal contract, as laid in the declaration. *Abbott C. J.* thought this an undertaking for the default or miscarriage of another, within the statute of frauds; and, consequently, that the promise ought to have been in writing, and the plaintiff was nonsuited. The *distringas* was returnable on *Monday*, the 17th. The motion for a new trial was made

made on the 21st; and although more than four days had elapsed since the trial, the Court agreed, after consulting with the Master, that such a motion might be made at any time within four days after the return of the *distringas*; and

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against
MASTER.

Abraham now moved for a new trial. The son, on whose behalf the promise was made at the time of making such promise, did not owe any debt to the plaintiff. This is not, therefore, an undertaking for the debt of another. The liability of the son for damages was not created at the time when the promise was made, and that is essential to bring the case within the statute of frauds. In *Read v. Nash* (a) it was decided, that a promise by a third person to pay damages, in case plaintiff would withdraw his record in an action for an assault and battery, was not within the statute. The court there said, "that the defendant, in the original action, was not a debtor; the cause was not tried; he did not appear to be guilty of any default or miscarriage; there might have been a verdict for him if the cause had been tried; he was never liable to the particular debt, damages, or costs;" and the authority of that case was afterwards recognized by the Court of Common Pleas, in *Fish v. Hutchinson*. (b) *Burkmire v. Darnell* (c) is an authority to shew, that the statute of frauds contemplated only an engagement to answer for the contract and not for the tort of another; and, therefore, that a promise to answer for the wrong of another need not be in writing.

(a) 1 *Wils.* 305.(b) 2 *Wils.* 94.(c) 6 *Mod.* 249. *Ld. Raym.* 1085.

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ABBOTT C. J. This case is clearly within the mischief intended to be remedied by the statute of frauds: that mischief being the frequent fraudulent practices which were too commonly endeavoured to be upheld by perjury; and if it be within the mischief, I think the words of the statute are sufficiently large to comprehend the case. The words are these: "No action shall be brought to charge a defendant upon any special promise to answer for the debt, default, or *miscarriage* of another person." Now the word "miscarriage" has not the same meaning as the word "debt" or "default;" it seems to me to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and licence, and thereby causing its death, is clearly an act for which the party is responsible in damages; and, therefore, in my judgment, falls within the meaning of the word "miscarriage." The case of *Read and Nash* is very distinguishable from this: the promise there was to pay a sum of money as an inducement to withdraw a record in an action of assault, brought against a third person. It did not appear that the defendant in that action had ever committed the assault, or that he had ever been liable in damages; and the case was expressly decided on the ground that it was an original, and not a collateral promise. Here the son had rendered himself liable by his wrongful act, and the promise was expressly made in consideration of the plaintiff's forbearing to sue the son. I therefore think that the nonsuit was right.

HOLROYD

HOLROYD J. (a) I am also of opinion that the nonsuit in this case was right. I think the term *miscarriage* is more properly applicable to a ground of action founded upon a tort than to one founded upon a contract: for in the latter case the ground of action is, that the party has not performed what he agreed to perform; not that he has misconducted himself in some matter for which by law he is liable. And I think, that both the words *miscarriage* and *default* apply to a promise to answer for another with respect to the non-performance of a duty, though not founded upon a contract. This case is certainly within the mischief contemplated by the legislature, and it appears to me to be within the plain, intelligible import of the words of the act of parliament.

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 KIRKHAM
 against
 MARTIN.

BEST J. It appears to me that this case is within the spirit and principle, as well as the words of the act. The principle of the act is this; that where a man undertakes to do something which by law he is not bound to perform, it shall be reduced to writing. Here the defendant does undertake to do something that by law he is not bound to do. It is not reduced to writing, and, therefore, that brings it within the spirit of the act. The question is, whether the words of the act are large enough to embrace this case. There is nothing to restrain these words *default* or *miscarriage*; and it appears to me that each of them is large enough to comprehend this case.

Rule refused.

(a) Bayley J. had left the court.

1819.

Saturday,
May 29d.

WOOD *against* PERKES.

The venue having been changed by the defendant, from *London* to *Staffordshire*, on the usual affidavit, the Court refused to bring back the venue to *London*, on an affidavit that the cause of action arose partly in *Staffordshire* and partly in *Worcestershire*, and that a material witness resided in *London*, and on the plaintiff's undertaking to give material evidence in one or other of those counties.

THE venue which was originally laid in *London* had been changed to *Staffordshire*, on the usual affidavit; and a rule nisi was obtained for bringing back the venue to *London*, upon the plaintiff's undertaking to give material evidence either in *Worcestershire* or *London*. The affidavit stated that the cause of action arose partly in *Staffordshire* and partly in *Worcestershire*, and added that the residence of a material witness was in *London*. This affidavit, however, disclosed no particular fact shewing that the cause of action did not arise wholly in *Staffordshire*. In answer to this last application, it was again sworn positively, that the cause of action arose wholly in *Staffordshire*, and not elsewhere.

Reader, against the rule, relied on the usual practice which had prevailed of not bringing back the venue, without an undertaking to give material evidence in the county where it was originally laid.

D. F. Jones, contra, cited *Cailland v. Champion* (a), *Hunt v. Bridgford* (b), *Neale v. Nevill* (c), *Powell v. Rich* (d), and contended, that by the offer to give material evidence either in *Worcestershire* or *London*, he had virtually negatived the original affidavit.

(a) 7 T. R. 205.

(c) 6 Taunt. 565.

(b) 1 Taunt. 259.

(d) 7 Taunt. 178.

ABBOTT

ABBOTT C. J. The plaintiff, in this case, seeks to bring the venue back on an affidavit very different from those filed in the cases which have been cited. In *Cailland v. Champion*, the rule was obtained on an affidavit, which negatived that the whole cause of action arose in *London*, by stating the fact that the party whose life was insured died in *Scotland*; but there is no allegation of any such distinct fact in the plaintiff's affidavit in support of this motion. The plaintiff only generally denies that the cause of action arose wholly in *Staffordshire*; but that is swearing to what is, in his judgment, the legal result of the facts. I am therefore of opinion, that in order to bring himself within the cases, it was necessary for him to state some special fact in his affidavit to negative the affidavit made in order to change the venue.

BAYLEY J. I am of the same opinion. The present is a very unreasonable application. The plaintiff only states that the cause of action arose partly in *Staffordshire*, and partly in *Worcestershire*; but that affords no reason for his trying the cause in *London*.

HOLROYD J. This case is very distinguishable from *Cailland v. Champion*. There a particular fact was stated and not denied; but if that be not done, it is the settled practice of the Court not to bring back the venue, unless the plaintiff undertake to give material evidence in the county in which it was originally laid.

BEST J. concurred.

Rule discharged.

1819.

Wood
against
Peakes.

1819.

Saturday,
May 22d.

The KING *against* The Governor and Company
of the Bank of ENGLAND.

The Court will not grant a mandamus to a trading corporation, at the instance of one of its members, to compel them to produce their accounts, for the purpose of declaring a dividend of the profits.

DENMAN moved for a mandamus to the Governor and Company of the Bank of *England*, to produce an account of the income and profits for the last half-year, preceding the holding of the last general court which was held on the 18th *March*, 1819, with an account of the charges of management for the said half year, for the purpose of enabling the next general court to consider the state and condition of the company, and to declare a dividend of all the profits, the charges of management only excepted. The affidavit, in support of the motion, stated that the applicant was a member of the corporation, and a proprietor of 500*l.* bank stock. It then set out part of the charter, by which it appeared that it was competent to the proprietors, in their general courts, to make by-laws relating to the government of the corporation. It then stated, that in the year 1697, the following by-law was made, viz. "That twice in every year a general court shall be held for considering the general state and condition of this corporation, and for the making of dividends out of all and singular the produce and profit of the capital stock and fund of this corporation, and the trade thereof, amongst the several proprietors therein, according to their several shares and proportions. The one of which said courts shall be held between the 10th and 25th days of *September*, the other between the 10th and 25th days of *March*, yearly." The affidavit then stated that the applicant, on the 3d of *December*, 1818, had given notice to the governor and directors of the bank
to

to produce, on the day on which the next half-yearly court should be held, an account of the income and profits for the half-year preceding that day, with an account of the charges of management for the said half-year, to be laid before the court, for the purpose of enabling the court to consider the state of the company, and to declare a dividend on all the profits, the charges of management only excepted. The affidavit then stated that a general court was held on the 18th *March*, 1819, and that the governor and directors of the Bank of *England* refused to comply with his demand. The motion was then made that the accounts should be produced, which motion was negatived by a majority of the Court. It was now contended that it was imperative on the corporation to divide their profits half-yearly; and the act of the 7th *Anne*, c. 7., was referred to, by which it was expressly enacted, That all the profit arising out of the management of the corporation, &c., the charges of managing the business of the governor and company only excepted, should be applied from time to time to the use of all the members of the said corporation for the time being, rateably and in proportion to each member's part, share, or interest in the common capital and principal stock of the governor and company of the Bank of *England*. This act is imperative on the company to divide their profits, half-yearly, among all the members for the time being. Now, if the company be permitted to accumulate profits, they will not be divided among the members for the time being, but will be divided among subsequent purchasers of stock.

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ABBOTT C. J. This is an application for a mandamus to a trading corporation, at the instance of an individual member, to compel the directors of that corporation to produce their accounts and divide their profits. It is, in effect, an application on the behalf of one of several partners to compel his co-partners to produce their accounts of profit and loss, and to divide their profits, if any there be. The examination of the accounts of a trading company may be effectually entered into in the Court of Chancery; but this Court is a very unfit tribunal for such a subject. A mere trading corporation differs materially from those which are entrusted with the government of cities and towns, and therefore have important public duties to perform. No instance has been cited in which the Court has granted a mandamus to a corporation like the present, and I think we ought not now to establish the precedent.

BAYLEY J. The Court never grant this writ except for public purposes, and to compel the performance of public duties. This is an application, at the instance of one of several partners in a trading company, to compel his co-partners to divide their profits: but that is a mere private purpose, and presents a fit subject for enquiry on the other side of the hall. There is no instance in which the Court have granted a mandamus to a trading corporation; and that being so, I think that we should not now grant it for the first time.

HOLROYD

HOLROYD J. I am of the same opinion. The effect of this application would be to compel a public exposure of private concerns, and I think it ought not to be granted.

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England.

BEST J. If we were to grant this rule, we should make ourselves auditors to all the trading corporations in *England*.

Rule refused.

BORWICK *against* WALTON.

Monday,
May 24th.

HOLT had obtained a rule nisi to discharge the rule to bring in the body, on the ground that the plaintiff had brought an action against the sheriff for the escape of the defendant, and had already recovered the full debt. It appeared that the defendant had been arrested at the suit of the plaintiff, and the sheriff, upon a rule served upon him to return the writ, had returned *cepi corpus et paratum habeo*. But bail above not having been put in, and there being no render or bail-bond, the plaintiff brought his action against the sheriff for an escape, and recovered a verdict for 200*l.*, which he had received, together with the costs. The plaintiff, notwithstanding the verdict, had ruled the sheriff to bring in the defendant's body, contending that he had a right to do so, inasmuch as the sheriff, by the return of *cepi corpus*, had charged himself with the custody of the body; and was therefore bound to bring the defendant into court.

After the sheriff had returned *cepi corpus*, the plaintiff brought an action for an escape, and recovered the debt: Held that he could not, after this, rule the sheriff to bring in the body.

Espinasse shewed cause. The plaintiff has a right to require the sheriff to bring the defendant into court,
in

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in order that the original action may proceed. The action had been commenced against the defendant, as acceptor of a bill of exchange, and the plaintiff had likewise brought several actions against the drawer and indorser. He has a right to recover all his costs in those actions (which are unsettled, the parties being insolvent) against the present defendant; and for that purpose, the plaintiff is proceeding in the action. The recovery in the action for the escape is collateral to the merits of the original action, and is a penalty upon the sheriff for his neglect of duty, and not a satisfaction for the debt.

Holt contrà, for the sheriff. Whatever remedy the plaintiff may have against any other person, he has made his election to consider the defendant as not in the custody of the sheriff, but as having escaped out of such custody by the sheriff's default. It will therefore be inconsistent to punish the sheriff for not having the defendant in custody, and to proceed against him at the same time, as if he had him in custody. He has already paid the debt in the action for the escape, and ought not to pay it twice over.

Per Curiam. The plaintiff has brought his action against the sheriff for the escape, and has recovered his whole debt, and he is now desirous to turn round upon the sheriff, and to say, "It is true, I chose to consider the defendant for one purpose out of your custody, and as having been suffered to escape, by your own negligence, but I will now consider him, for another purpose, as in your custody, and as not having escaped." In other words, "having already one satisfaction, it is convenient for me to receive another." Such proceedings
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ings are not to be borne. The plaintiff has made his election to proceed against the sheriff for an escape, and, as far as the sheriff is concerned, he must abide by it.

Rule absolute, with costs.

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The Marquis of CHOLMONDELEY *against* Lord CLINTON.

THE Master of the Rolls sent the following case for the opinion of this Court :

By indenture of bargain and sale, duly inrolled in the Court of Common Pleas, dated the 11th *June*, 1781, and made between *George Earl of Orford*, of the first part; *Charles Lucas*, of the second part; and *Joshua Sharpe*, of the third part; the said *George Earl of Orford* duly conveyed certain manors and hereditaments in the counties of *Devon* and *Cornwall*, whereof he was tenant in tail by purchase, to the use of *Charles Lucas*, his heirs and assigns, in order to make him tenant to the precipe, for the purpose of suffering two common recoveries, with double vouchers, in which the said *George Earl of Orford* should be vouched, which recoveries were thereby declared to enure, to the use of the said *George Earl of Orford*, his heirs and assigns, for ever. And in *Trinity* term, 1781, two common recoveries, with double vouchers, were duly suffered, in pursuance of the said indenture of bargain and sale, of all the aforesaid manors and other hereditaments, in which recoveries the said *George Earl of Orford* was vouched, and vouched the common vouchee. The said *George*

Where *A.*, in a conveyance to uses, settled an estate for life on himself, remainder in tail to his issue, with an ultimate limitation to the heirs of *S. R.* in fee; and at the time of the settlement *A.* was himself the right heir of *S. R.* : Held that this ultimate limitation was void, and that the estate after the death of *A.* without issue, descended on his heirs general. Held, also, that it was not competent to go into the intention of the settlor, apparent from the recital, in order to explain the words of this limitation, they being words of plain and well-known import.

Bayley J. Dissentiente.
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Earl of *Orford* afterwards executed certain indentures of lease and release, bearing date respectively the 1st and 2d *August*, 1781: the indenture of release being made between the Right Hon. *George* Earl of *Orford*, described as only son and heir of *Robert* Earl of *Orford*, by *Margaret* his wife, also deceased, who was the daughter and only surviving child and heir of *Samuel Rolle*, late of *Heanton*, in the county of *Devon*, Esquire, deceased, who was the only son and heir at law of *Robert Rolle*, of the same place, Esquire, by *Arabella* his wife, who was the daughter and one of the coheirs of *Theophilus Clinton*, Earl of *Lincoln* and Baron of *Clinton*, also deceased, of the one part; and *Joshua Sharpe*, Esquire, of the other part: it recited the last will of the said *Samuel Rolle*, so far as to shew the gifts to his own sons, and to his daughters, and to the sons and daughters of his daughter; it then recited that the said *Samuel Rolle* did, in or about the month of *November*, 1719, depart this life without revoking his will, leaving the said *Margaret Rolle*, his daughter and only child him surviving, who afterwards intermarried with the said *Robert* then Lord *Walpole*, afterwards Earl of *Orford*; and that the said *Margaret*, late Countess of *Orford*, did, in or about the month of *January* then last past, depart this life, leaving the said *George* Earl of *Orford* his son and only child, who, by virtue of the will of the said *Samuel Rolle*, became entitled to all his manors, lands, tenements, and hereditaments, as tenant in tail. And that by indenture of bargain and sale tripartite, bearing date the 11th day of *June* then last past, and inrolled in his majesty's Court of Common Pleas, and made between the said *George* Earl of *Orford*, of the first part; *Charles Lucas*, of *New Inn*, in the county of
of

of *Middlesex*, Gentleman, of the second part; and *Joshua Sharpe*, of *Lincoln's Inn*, in the said county of *Middlesex*, Esquire, of the third part; the said *George* Earl of *Orford* did grant, bargain, and sell to the said *Charles Lucas* and his heirs, amongst other lands, the several lordships, manors, lands, tenements, and hereditaments therein, and afterwards in the now recited indenture of release particularly mentioned, being the estate and inheritance of the said *Samuel Rolle*, to hold the same to and to the use of the said *Charles Lucas*, his heirs and assigns, for ever, to the intent and purpose that he might become a good and perfect tenant of the immediate freehold and inheritance of the said premises, against whom common recoveries might be had and perfected in the manner therein mentioned for that purpose; which said recoveries, and all other recoveries, fines, and other assurances of and concerning the premises were thereby declared to be and enure to the use of the said *George* Earl of *Orford*, his heirs and assigns, for ever; and that two common recoveries of the said several lordships, manors, lands, tenements, and hereditaments in the counties of *Devon* and *Cornwall*, formerly the estate and inheritance of the said *Samuel Rolle*, had been accordingly suffered; but that the said *George* Earl of *Orford* was willing and desirous that the same premises should continue and remain in the family and blood of the said *Samuel Rolle*. It then witnessed, that for and in consideration of the natural love and affection which the said *George* Earl of *Orford* had and bore unto his relations, the heirs of the said *Samuel Rolle*, and to the intent that the manors, messuages, lands, tenements, and hereditaments, thereafter mentioned,

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tioned, might remain, continue, and be in the family and blood of his late mother, the said *Margaret Countess of Orford*, on the side or part of her said father, the said *Samuel Rolle*, for a nominal consideration, he the said *George Earl of Orford*, did grant, bargain, sell, release, and confirm, to the said *Joshua Sharpe*, and to his heirs, the aforesaid manors and hereditaments, in the counties of *Devon* and *Cornwall*, and then described the parcels thus: "All and singular the aforesaid premises were formerly the estate and inheritance of the said *Samuel Rolle*, deceased;" and then added, "and all other the manors, lands, tenements, tithes, and hereditaments, of him the said *Gorge Earl of Orford*, with their and every of their rights, members, and appurtenances whatsoever, which were the estate and inheritance of the said *Samuel Rolle*, situate, lying, and being in the several towns, parishes, hamlets, and places aforesaid, and every or any of them, or elsewhere, in the said counties of *Devon* and *Cornwall*; to hold to the said *Joshua Sharpe*, his heirs and assigns, to, for, and upon such uses, trusts, intents, and purposes, and by and under such limitations, powers, provisoes, and agreements, as were thereafter limited, declared, or mentioned, of and concerning the same," and the uses were declared in these words: "To the use and behoof of the said *George Earl of Orford*, for and during his natural life, without impeachment of, and with full power to do and commit any manner of waste on the said premises, or any part or parts thereof; and from and after his decease, to the use and behoof of the heirs of the body of him the said *George Earl of Orford*, lawfully to be begotten, and, in default of such issue, to the use and behoof of such person or persons,
for

for such estate or estates, rights and interests, and to, for, and upon such uses, trusts, intents, and purposes, and subject to such provisoes, conditions, and agreements, as the said *George Earl of Orford*, by any deed or writing, or by his last will and testament in writing, by him duly executed, in the presence of, and attested by two or more credible witnesses, should declare, limit, direct, or appoint; and, in default of such declaration, limitation, direction, and appointment, to the use of the right heirs of the said *Samuel Rolle* for ever, and to, for, or upon no other use, intent, or purpose whatsoever: Provided always, and it was thereby declared and agreed, and it was the true intent and meaning of these presents, that it should and might be lawful to and for the said *George Earl of Orford*, at any time or times hereafter, during his natural life, by any deed or deeds, writing or writings, under his hand and seal, duly executed in the presence of, and attested by two or more credible witnesses, or by his last will and testament in writing, attested as aforesaid, from time to time, and at all times thereafter, to alter, revoke, or make void all or any of the estates, uses, and limitations thereinbefore specified or limited, and also, by the same or any other deed or deeds, writing or writings, or by his last will and testament, so executed and attested as aforesaid, to limit or declare any other or new use or uses of all and singular the said manors, lands, tenements, hereditaments, and premises, or any part or parts thereof, at his free will and pleasure, and as to him the said *George Earl of Orford* should seem meet; and also from time to time, and at all or any time or times during his life, to grant, charge, lease, demise, or convey all and singular the aforesaid manors, lands, tenements, hereditaments,

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and premises, or any of them, or any part or parcel thereof, to any person or persons, according to his own free will and pleasure, either in fee-simple or for life or lives, or any number of years determinable on the death of any person or persons, or for any number of years absolute, in possession, reversion, or by way of future interest, and in such form, manner, and sort as the said *George Earl of Orford* should think fit and proper; all and singular which said grants, charges, leases, demises, and conveyances of the premises, or any part thereof, should be good and effectual, to all intents and purposes. On the 5th of *December*, 1791, *George Earl of Orford* died without issue, and intestate, and without having altered or revoked the limitations contained in the indenture of the 2d *August*, 1781. At the date of that indenture, *George Earl of Orford* himself was the right heir of *Samuel Rolle*. At his death, *Robert George William Trefusis* was the right heir of *Samuel Rolle*, and the heir of *George Earl of Orford*, on the part of his mother, the daughter of the said *Samuel Rolle*; and there was an heir of the said *George Earl of Orford*, ex parte paterna.

This case was twice argued; first in *Michaelmas* term last by *Richardson*, for the plaintiff, and *Preston* for the defendant; and, secondly, in this term, by *Shadwell*, for the plaintiff, and *Copley Serjt.* for the defendant.

Richardson and *Shadwell*, for the plaintiff. The question is, whether *Mr. Trefusis* took any estate under this limitation in *George Earl of Orford's* settlement. It appears, that *George Earl of Orford* was tenant in tail by purchase, and consequently, by the recovery which

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was suffered, and which enlarged his estate tail into a fee, the estate would, by law, descend not to his heirs *ex parte materna*, as would have been the case had he been tenant in tail by descent, but to his heirs general, *Martin v. Strachan* (a), *Roe v. Baldwere* (b), *Abbot v. Burton*. (c) Under these circumstances, he made the settlement on which the question arises, by which he limited the estate first, to his own own use for life, and after his decease, to the use of the heirs of his own body, and, in default of such issue, to the use of such persons as he might by deed or will appoint; and then to the use of the right heirs of *Samuel Rolle* for ever. Now, as *George Earl of Orford* was himself right heir of *Samuel Rolle*, at the time when this deed was executed, this latter limitation may be properly considered as tantamount to a limitation of the estate to his own right heirs. And it was decided, in *Bingham's case* (d), *The Earl of Bedford's case* (e), and *2 Rolle's Abridgment* (f), that a man cannot make his own right heir a purchaser, and that such a remainder is void. Then this limitation is in fact part of the old use, still remaining in *George Earl of Orford*, and if so it will descend to his heirs general. But it is said, that this being a conveyance to uses, must be construed differently from a common law conveyance. That is, however, not the law. For in *Tapner v. Merlott* (g) the rule was distinctly laid down by Lord C. J. *Willes*, that a conveyance to uses was not to be construed as a will, according to the intention of the parties, but as a common law conveyance; and he expressly disclaims the

(a) 1 *Wils.* 66.(b) 5 *T. R.* 104.(c) *Salk.* 590.(d) 2 *Coke*, 91.(e) *Poph.* 3.(f) 415. D. pl. 1. tit. *Remainder*.(g) *Willes*, 177.

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doctrine in *Leigh v. Brace*. (a) Lord *Kenyon*, in *Alpass v. Watkins* (b), speaking on this point, says, that a deed to uses must be construed as a common law conveyance; and again, in *Doe v. Morgan* (c), he says, “Soon after the statute of uses, an attempt was made to introduce a different construction on deeds to uses, from that which was put on common law conveyances; but that attempt failed of success, and the same rule of construction applies to both.” The attempt to which Lord *Kenyon* alluded, was in the case of *Abraham v. Twigg*. (d) Then if this be so, it remains to be considered how this limitation would, in a common law conveyance, be construed. In commenting on *Littleton*, s. 30., Lord *Coke* puts this case. “If a man hath issue two daughters, and dieth seised of two acres of land in fee-simple, and the one coparcener giveth her part to her sister and the heirs of the body of her father, in this case, the donee hath an estate tail in the moiety of the donor’s part, for the donee is not the entire heir, but the donor is heir with the donee; and she cannot give to the heirs of her own body, and the donee hath the other moiety of her sister’s part for life.” (e) There the gift fails as to that part of which the donor is heir, such limitation being void. That is exactly a case in point. In *Rigden v. Vallier* (f), where the question was only whether the words of the limitation created a tenancy in common, the judgment of Lord *Hardwicke* (if indeed it can be considered as a final judgement, inasmuch as he offered to send a case to be argued before two common law Judges,) proceeded, on the ground

(a) *Carth.* 343.(b) 8 *T. R.* 519.(c) 3 *T. R.* 765.(d) *Cro. Eliz.* 478.(e) *Co. Lit.* 26. b.(f) 3 *Atk.* 734. 2 *Ves.* 257. S. C.

that

that the words there were words of regulation or modification and not of limitation. The same observation applies to *Fisher v. Wigg.* (a) But in *Idle v. Cooke* (b), where the question turned on words of limitation, the Court came to a different conclusion. Then, considering this as a deed at common law, the intention, if it were even clearly expressed in this recital, which it is not, still could have no operation in construing the words of the limitation in the habendum. In *Sheppard's Touchstone*, 75, 76. it is laid down, that a recital is the setting down, or report, of something done before, and that it is not an essential part of the deed. Lord *Coke* mentions eight parts of a deed; first, the premises which include the names of the parties, and the description of the lands granted; second, the habendum; third, the tenendum; fourth, the reddendum; fifth, the clause of warrantry; sixth, the in cuius rei testimonium; seventh, the date; eighth, the clause his testibus. And in *Litt. s. 371.*, *Co. Litt. 229. b.*, the precedent of a deed is given, which contains no recital; and Lord *Coke*, in his comment says, that there are three general parts of a deed, the premises, the habendum, and the in cuius rei testimonium. Now, if it were true, that the recital could be introduced in order to controul the deed, it is surely very strange that it should have been thus wholly omitted to be considered as a part of the deed by these eminent persons. It can, therefore, have no effect upon a clear limitation like the present. It is to be observed, that the argument on the other side is contrary to the policy of the law which favours the vesting of estates, by construing these words as limiting a future estate. That such is the policy, appears from

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(a) 1 P. Wms. 16.

(b) 1 P. Wms. 70.

1819. *Purefoy v. Rogers* (a), *Doe v. Maxey* (b), and *Sheffield v. Ratcliffe* (c); and, as to the intention of *George Earl of Orford*, as expressed in this recital, on which so much stress is laid, it is by no means clear. The case then stands thus. This limitation, although found in a conveyance to uses, must be construed as if in a common law conveyance. If so, then, according to the plain words, and according to the policy of the law which favours the vesting of estates, it must be construed as a limitation to the settlor himself, which by a rule of law is void. The consequence is, that the reversion remained undisposed of by the settlement, and descended on the heirs general of *George Earl of Orford*.

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Copley Serjt., and *Preston*, for the defendant. This limitation is to such person as should be the heir of *Samuel Rolle* at the time of the failure of issue of *George Earl of Orford*. In order to establish that point it is necessary to examine this deed, and to discover the intention of the party. It begins by deducing Lord *Orford's* pedigree from *Theophilus Lord Clinton*, through *Samuel Rolle*; and after reciting that the property in question came to him by the will of *Samuel Rolle*, and that a recovery had been suffered, proceeds to state that the said *George Earl of Orford* was willing and desirous that the same premises should continue and remain in the family and blood of the said *Samuel Rolle*, and then witnesses, that in consideration of the natural love and affection which he bore to his relations, the heirs of *Samuel Rolle*, and in order that the manors, &c. might remain and continue in the family.

(a) 2 *Saund.* 380.

(b) 12 *East*, 604.

(c) *Hob.* 338.

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and blood of *Margaret* Countess of *Orford*, on the side or part of her father *Samuel Rolle*, the said *George Earl of Orford* did grant, &c. Now nothing can be more marked than the intention here. It was obviously his design that this estate, and the title of *Clinton*, should go together; for the pedigree is deduced, not merely from *Samuel Rolle*, but through him from *Theophilus Lord Clinton*. Then the next recital shews that the recovery had defeated that object, by making the estate descendible to his heirs general; and it was to remedy this that the settlement was made. But if by the ultimate limitation to the right heirs of *Samuel Rolle*, the Court hold that the settlor himself was meant, it would defeat this, which was the only object of the settlement, by still making the heirs general take the estate. It is impossible to suppose that he could have meant to describe himself by that circumlocution. It must, however, be admitted, that it is not sufficient to shew that. The argument must go further, and shew who was meant by that expression. The first step is this; if it did not mean the right heirs of *Samuel Rolle*, at the time of executing the settlement, it must have meant the right heirs of *Samuel Rolle* at some future period. Then, if so, at what period? His object was that the estate might remain and continue in the family and blood of *Samuel Rolle*; and to effectuate that he made the settlement. He first gives himself an estate for life, and he then makes a limitation to his issue. Now during his life and that of his issue the object would still continue accomplished. But after his issue became extinct, the estate would, according to law, have gone to his heirs general; and it was to avoid this consequence that the limitation is introduced.

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Then that most distinctly points out the period to be when the settlor and his issue are extinct. It is then that this remainder is to vest in the individual who should then be the heir of *Samuel Rolle*. And the power of appointment reserved by *George Earl of Orford* is not inconsistent with this idea. But it is said, why may he not have intended the late Lord *Clinton* as *persona designata* by this description? That is impossible; for he deduces his own pedigree as eldest son of the only child of *Samuel Rolle*; and, therefore, he must have known that he was himself the heir. Then reliance is placed on the words “natural love and affection,” as being applicable to existing persons only. But what difficulty is there in conceiving that love to existing persons may be well shewn by vesting an estate in their descendants? These are the principal objections which have been made to the clearness of the intention as expressed in the deed; and they do not seem entitled to much weight. If so, the construction consonant to the settlor’s intention is this, that the estate was to vest in the person who should be heir of *Samuel Rolle* at the time of the failure of the issue of the settlor. If the limitation had been worded “to the use of the *then* right heirs of *Samuel Rolle*,” it would have been quite clear; and the intention supplies that word. On the other side, it must be construed as if it were the *next* right heirs of *Samuel Rolle*. Having established this point, the next question will be, whether there is any rule of law which prevents its adoption? It is said, and it must be admitted to be true, that the law favours the vesting of estates; but that is not so where the intention is clearly otherwise. *Doe*

v. *Mary*

v. *Maxey*. (a) All instruments must be construed according to the intention of the parties. Lord C. J. *Willes*, in delivering judgment in the case of *Smith, dem. Dormer, v. Packhurst* (b), lays down several maxims as to the construction of deeds; the first of which is, that the end and design of the deed should take effect rather than the contrary. And, again, "such construction should be made as is most agreeable to the intention of the grantor. The words are not the principal things in a deed; but the intent and design of the grantor." And he adds, that these are the rules laid down by *Plowden*, *Coke*, and *Hale*, and that the law commends the astutia of the Judges in construing the words in such a manner as shall best answer the intent. On these principles that case was decided. The same doctrine will be found in *Lisle v. Gray* (c), where, to carry the manifest intention of the grantor into effect, the words "heirs male" were construed as "sons." Again, in *Moore v. Magrath* (d), Lord *Mansfield* expresses himself to the same effect, and argues there from the recital, which shews that the argument on the other side is not correctly founded. Lord *Mansfield* calls it the key to the deed. The same rule of construction is found in the Earl of *Clanrickard's* case (e), where "those Judges are exceedingly commended who are curious and almost subtle to invent reasons and means to make acts according to the just intent of the parties." And in *Ginger, dem. White, v. White* (f), it is said "verba intentioni et non e contra debent inservire," *Wright v. Kemp* (g), *Hodgson v. Bussey* (h),

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(a) 12 *East*, 604.(d) *Cowp.* 9.(g) 5 *T. R.* 470.(b) 3 *Atk.* 136.(e) *Hob.* 277.(h) 2 *Atk.* 89.(c) 2 *Lev.* 223.(f) *Willes*, 348.

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and *Cartwright v. Wright* (a), are to the same effect. And the Judges will, in order to satisfy the intention, transpose, substitute, and even insert words. In *Darqn v. Ross* (b), Lord *Thurlow* construed the word "her" as "his," and intimated, that if he could clearly see the party's intention, he would substitute one word for another. The case of *Watson v. Foxon* (c) arose on a will, but the others are all cases of common law conveyances. There is, therefore, no necessity for resorting to the argument that this a deed to uses. In some respects, however, it is clear, that a conveyance to uses is construed differently from a common law conveyance. As, for instance, *Swain v. Barton* (d), a man may there limit to the use of his own right heirs, and the limitation will not be void, as in a common law conveyance. But it is said, the word heirs is too strong, and not capable of qualification. *Burchett v. Durdant* (e), *James v. Richardson* (f) *Lisle v. Gray* (g), *Peacock v. Spooner* (h), *Dafforne v. Goodman* (i), *Darbison v. Beaumont* (k), and *Goodwright v. White* (l), are, however, cases to the contrary, and shew, that it may be qualified by the intention apparent on the face of the deed. The strongest cases on this point are *Cranmer's case* (m), and *Spark v. Spark*. (n) In the former, a reversioner in fee of a lessee for term of years, granted the reversion in fee by deed, to the use of the grantor himself for life, and after his death to the executors of the grantor. And it was held, that the executors took as purchasers. In the latter, where

(a) 1 Burr. 282.

(d) 15 Ves. jun. 365.

(g) 2 Lev. 225.

(k) 1 P. Wms. 232.

(n) Cro. El. 666.

(b) 3 Brown's Rep. 27.

(e) 2 Ventr. 311.

(h) 2 Vern. 195.

(l) 2 Blac. 1010.

(c) 2 East, 36.

(f) 2 Lev. 232.

(i) 2 Vern. 362.

(m) Dyer, 309.

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the lease was by a third person to *W. S.* for eighty years, if he should so long live, remainder to his executors for forty years, the decision was different, and this reason assigned, because, in *Cranmer's* case it is limited, *by way of use, and by the grantor himself, so that he shews his own intent.* That case is almost precisely in point to this; for the executors, with respect to a chattel interest, are as the heirs with respect to a freehold: and this is limited by way of use, and by the grantor himself, so that he shews his own intent. The heirs of *Samuel Rolle* in this deed are as the heirs of *I. S.*; and so the case is taken out of the rule in *Shelly's* case: and, if not within the letter of that rule, according to Lord *Mansfield*, it is departed from in favour of intention. *Doe v. Laming* (a), *Webb v. Herring*. (b) There is also another class of cases, where the heir, though not very heir, has been held to take under that description. *Newcomen v. Barkham* (c), *Wills v. Palmer* (d), *Baker v. Wall* (e), *Pybus v. Mitford*. (f) In the latter case, the heirs of the body of the covenantor's second wife were held to be a good name of purchase; and so here the heirs of *Samuel Rolle* will be a good name of purchase. As to *Goodtitle v. Pugh* (g), the principle there laid down is in favour of the argument for the defendant. That case turned upon the intention, and it was decided, on the ground that it was not clear who was to take, and, therefore, the heir was not disinherited; but here the intention is clear, and it is also clear who the person is who was intended to take.

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(a) 2 Burr. 1107.

(c) 2 Vern. 729.

(f) Ventr. 378.

(b) 2 Bulstr. 195. 1 Roll. Rep. 436.

(d) 5 Burr. 2615.

(e) 1 Str. 41.

(g) 3 Bro. Parl. Cas.

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The whole, in fact, turns upon that point. If the intention be clear, as it is, there is no rule of law which prevents the Court from carrying it into effect.

Richardson and Shadwell, in reply. The numerous cases cited on the other side will be found all reducible to one class, viz. where the words of the limitation are ambiguous. No doubt, in such a case, the Court will resort to the intention to explain such ambiguous words. But here the words taken *simpliciter* are perfectly unambiguous; and it is only by arguments upon the deed itself, that any doubt as to their meaning is first raised and then settled. If it were necessary to go into the intention, it might easily be shewn how doubtful it is; and as to the object of the continuance of this estate in the blood of the *Rolles*, the moment the fee vested in the person who should be heir after the failure of issue of Lord *Orford*, it is obvious that he might dispose of the fee, and defeat the continuance of the supposed object. If this limitation be only doubtful, it is sufficient, for the heir at law is not to be disinherited by a doubtful limitation. But it is clear, and clearly void in point of law.

Cur. adv. vult.

The Judges differing in opinion, the following certificates were afterwards sent to the Master of the Rolls.

This case has been argued before us by counsel; and considering that the words "the right heirs of *Samuel Rolle*" are words of plain and well known import, and, according to that import, must denote *George Earl of Orford*, the settlor, we think that *Robert George William*

William Trefusis, afterwards *Lord Clinton*, took no estate under the said indenture of the 2d of *August*, 1781. Supposing a different construction might be put upon those words in a deed, and that they might be held to designate some other person, in order to carry into effect a manifest intention on the part of the settlor, yet we do not collect with certainty, from the language of the deed, what other person the settlor intended to designate by those words.

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C. ABBOTT.

G. S. HOLROYD.

W. D. BEST.

This case has been twice argued; and considering that it appears by the indenture of 2d *August*, 1781, that the said *George Earl of Orford* knew himself to be the then heir of *Samuel Rolle*; considering also, that during the life of the said *George Earl of Orford*, or so long as there should be any issue of his body, no person could legally come within the description of right heir of *Samuel Rolle* but the said *George Earl of Orford* and his issue, who were of the united line of *Walpole* and *Rolle*, and were all provided for by the estate tail, created by that indenture; considering also that it appears plainly, by that indenture, that the said *George Earl of Orford* meant to provide for the separate line of *Rolle*, that no person of that separate line could come within the description of right heir of *Samuel Rolle*, till the united line should be exhausted, and that a limitation, by way of remainder to heirs or children, is not necessarily confined to such persons as are within that description at the time the limitation is created: I

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am of opinion, that the effect of the indenture of 2d August, 1781, was to vest in the said *George Earl of Orford* an estate in tail general, with remainder (if he should make no appointment) to such person as, at the expiration of that estate tail, should be right heir of *Samuel Rolle* in fee; and, consequently, that the said *Robert George William Trefusis* took an estate in fee under the said indenture.

J. BAYLEY.

HUMPHRIES *against* CULLINGWOOD.

It is no objection to the notice at the foot of a bill of *Middlesex*, that it wholly omit to state the year or word *next*.

HOLT had obtained a rule nisi for setting aside the service of the copy of the bill of *Middlesex* for irregularity, on the ground that the notice to appear omitted to state the year as well as the word “next;” and he cited *Wingfield v. Beard* (a), to shew that it was necessary to insert the year or the word *next*.

Amos now shewed cause, and contended that the statute 5 Geo. 2. c. 27. did not require any statement of the year in the notice to appear, and that the word “next” was wholly unnecessary; and he cited *The Weavers’ Company v. Forest* (b), *Steele v. Campbell* (c), *Pinero v. Hudson*. (d)

Per Curiam. It is unnecessary to state the year, because the party, by the statement of the day of the

(a) *Barnes*, 419.

(b) 2 Str. 1252.

(c) 1 Taunt. 424.

(d) 1 M. & S. 119.

month,

month, must understand that he is to appear at the earliest time to which the notice could apply. In *Butler v. Cohen* (a), this Court held that the service of the process was not irregular, because the year was in figures in the *English* notice; and the ground of that decision was, that it was not necessary to state the year at all in the notice. That decision took place after the Judges of this Court had conferred with the Judges of the Court of Common Pleas on that subject; and the practice of both Courts is now the same.

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Rule discharged. (b)

(a) 4 M. & S. 335.

(b) See *Eyre v. Walsh*, 6 Taunt. 333.

END OF EASTER TERM.



C A S E S

ARGUED AND DETERMINED

1819.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Fifty-ninth Year of the Reign of GEORGE III.

PROMOTIONS.

DURING this vacation, Sir *S. Shepherd*, His Majesty's Attorney-General, was appointed Lord Chief Baron of the Court of Exchequer in *Scotland*. And

Charles Warren, Esq., one of His Majesty's Counsel learned in the law, was appointed Attorney-General to His Royal Highness the Prince of *Wales*, and Chief Justice of *Chester*.

act of parliament, by which the proprietors were incorporated; and by which it was provided that the public should have the beneficial enjoyment of the same; the company having afterward taken up the railway: Held that a mandamus might issue to compel the company to reinstate and lay down again the railway.

Company to shew cause why a should not issue, directed to them, to reinstate, lay down again, and certain railway or tram-road, by the under the authority of certain acts or near a place called *Miry Stock Churchway Engine*, and which had destroyed by the company. It appears that the company had been in acts of parliament, the 49 and 50 (powered to make and maintain a road passable for waggons and other carriages at certain places mentioned in the act, from or near a place called *Miry Stock Churchway Engine*, in his majesty's they were empowered to raise money and to apply the same towards making the railway, and to receive certain goods carried along the railway; to have free liberty to pass upon a road with waggons or other carriages, as described, upon payment of the toll provided, that if the company did not do so within three years, the act would be in force. It appeared that the company had not made the railway within that time, and that

for the passage of carriages over that part of the railway which extended from *Miry Stock* to the summit of *Churchway Engine*, which part, for some time after the making of it, was used by the public, who experienced the convenience proposed by the promoters of the works. The affidavits then stated that the leading members of the company having become the owners of collieries situate on another branch of the rail-road, the company, a short time after the branches had been completed, for the purpose of preventing competition from the collieries communicating with that branch of the railway extending from *Miry Stock* to the summit of *Churchway Engine*, determined to render that branch of the rail-road impassable, and caused the iron tram-plates thereon, for a space of several hundred yards, to be taken up, and thereby destroyed that branch; whereby the public, and particularly persons possessing collieries in that part of the forest of *Dean* which lies contiguous to the last-mentioned branch, had been deprived of the benefit of using that branch of the railway. The affidavits then stated that application had been made to the company to reinstate the tram-plates, but that they had refused so to do.

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Scarlett and *Puller* now shewed cause. This is clearly a public and not a private highway, for it is common to all the king's subjects to pass over it with carriages constructed in a particular mode; and by the 73d clause a penalty is given to the company against any person who shall ride any horse, &c. along the railway. Now that is evidently the feature of a public and not of a private road; and if it be a public road, the law has provided another remedy, viz. that by in-

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dictment. The rule laid down by Lord *Mansfield* in *The King v. The Bank of England* (a) is this, where there is no specific remedy the Court will grant a mandamus in order that justice may be done; but where an action will lie for complete satisfaction equivalent to specific relief, and the right of the party applying is not clear, the Court will not interpose the extraordinary remedy of a mandamus. *Buller J.* lays down the same doctrine in *The King v. The Bishop of Chester*. (b) Now an indictment is the specific remedy to compel the repair of a public road: it is a remedy well known to the law, and in constant use. There is no instance, on the other hand, of a mandamus being granted for such a purpose, and that of itself is a very strong argument against the present rule. Possibly the company may not have funds for the purpose of reinstating, and the Court, in such a case, would not grant a mandamus. If this application succeeds, a mandamus will lie in every case where the locks of canal happen to be out of repair, and any party has an interest in having them repaired.

W. E. Taunton, in support of the rule. This can hardly be called a public highway: it is common only to those passengers who choose to use carriages of a particular description: it cannot be used by a person on horseback. [*Holroyd J.* It is a public highway to be used in a particular mode. A footway can be used only by foot passengers, and not by others, yet it is certainly a public highway. *Bayley J.* A towing path is to be used only by horses employed in towing vessels,

(a) 9 Dougl. 526.

(b) 1 T. R. 404.

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yet it is a common highway for that purpose.] An indictment is not a specific remedy in this case: it will not effect the purpose required, so speedily and effectually as a mandamus; for if the Defendants are convicted upon an indictment, the Court can only impose a fine upon them, being a corporation, and that fine may be levied by distress upon their property; and cases might occur where the tangible property of a corporation might be so small, that they might submit to the payment of any fine, and still not do the thing required. At all events, the remedy is not so speedy and effectual as that by mandamus. In *The King v. The Commissioners of Dean Inclosure* (a), it was said in argument that an indictment against the commissioners for not obeying an order of sessions directing them to set out a road as a public road, would not be a specific remedy, i. e., such a remedy as the case demanded: for an indictment was only a proceeding in pœnam for the past, and not a remedy for the future; and Lord *Ellenborough* C. J., in giving the judgment of the Court, said, “Upon the objection of there being another remedy in this case, I cannot help thinking that what has been observed by the counsel in support of the rule is extremely material, and that an indictment would not afford that convenient mode of remedy which might be obtained by mandamus.” That case is, therefore, an authority to shew that it is no objection to the granting of a mandamus to do a particular act that an indictment will also lie for the omission to do that act, and that they may be concurrent remedies. In *The King v. Bedford Level* (b), *Lawrence J.* seemed to consider that a quo warranto information

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(a) 2 M. & S. 80.

(b) 6 East, 367.

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and a mandamus may be concurrent remedies; and he said, that there might be occasions where a mandamus would be the more proper remedy. A mandamus here is the more proper remedy, because it will more speedily and effectually compel the doing of the thing required than an indictment.

ABBOTT C. J. I have entertained considerable doubts during the discussion, whether the Court ought to grant a mandamus to compel the doing of an act, the omission to do which may be prosecuted by indictment. I am now, however, satisfied, by the authorities cited in the course of the argument, that there is no reasonable ground for that doubt. If an indictment had been a remedy equally convenient, beneficial, and effectual as a mandamus, I should have been of opinion, that we ought not to grant the mandamus; but I think it is perfectly clear, that an indictment is not such a remedy, for a corporation cannot be compelled by indictment to reinstate the road. The Court may, indeed, in case of conviction, impose a fine, and that fine may be levied by distress: but the corporation may submit to the payment of the fine, and refuse to reinstate the road; and at all events a considerable delay may take place. The remedy, therefore, is not so effectual as that by mandamus. I am, therefore, of opinion, that the circumstance of the corporation being liable to an indictment, is no objection to the granting of a mandamus; and, upon the facts disclosed in the affidavits, I think this rule ought to be made absolute.

BAYLEY J. I am of the same opinion. By mandamus, the Court may compel the road to be reinstated.

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In the case of an indictment, the Court can only impose a fine, which fine can be levied only on the effects of the corporation, if any such effects can be found; and if it so happen that the corporation had no tangible property upon which the distress could operate, the remedy would be altogether ineffectual.

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HOLROYD J. concurred.

BEST J. Both upon principle and authority I am of opinion, that the Court ought to grant this mandamus. Numerous applications are made to parliament by speculative individuals, to form these navigable canals and railways: great public benefits are held out as an inducement to the legislature to sanction these undertakings; and when their sanction is obtained, is it to be permitted to these persons to say, that they will do only that which is beneficial to themselves, and disregard entirely the interests of the public? It has been argued in this case, that there is a specific remedy by indictment, and that, therefore, we ought not to grant a mandamus. I think, however, that that objection ought not to prevail in this case, for an indictment does not afford a remedy equally effectual to compel the reinstating of the road, which is the purpose to be answered by the granting of this writ. The Court can only impose a fine, in case a corporation be convicted upon an indictment, and that fine may be levied by distress from time to time; and even then the corporation may elect not to repair the road; and at all events considerable delay would ensue. By mandamus, on the other hand, the defendants will be compelled to do the thing required, unless, by the return to the man-

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damus, they shew a sufficient reason for not doing it; and if they shew no such reason, then a peremptory mandamus issues; and, in case of non-compliance, an attachment may issue against those who disobey the writ. There being, therefore, no other remedy equally effectual to answer the purposes required, I think that we ought to grant a mandamus; and, consequently, that this rule ought to be made absolute.

ABBOTT C. J. The writ should be to reinstate and lay down again, but not to maintain the tram-road.

Rule absolute.

*Saturday,
June 12th.*

CROCKER and Others against FOTHERGILL.

Demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not de-

mised; the tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default. The declaration in ejectment did not mention mines at all, but the sheriff, in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had liberty to dig: Held that, although the latter could not be recovered under the declaration in ejectment, still that the tenant by his own act had estopped himself from taking that objection, and that in an action for the value of three years' improved rent, under the statute of 11 G. 2. c. 19., the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig.

The improved or rack rent mentioned in the 11 G. 2. c. 19. s. 12. is not the rent reserved, but such a rent as the landlord and tenant might fairly agree on *at the time of delivering the declaration in ejectment*, in case the premises were then to be let.

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tenements, and premises of the plaintiffs, situate in the parish of *Bedwelty*, in the county of *Monmouth*; and that heretofore, to wit, on, &c. and whilst the defendant and the said other persons were so tenants to the plaintiffs of the lands, &c. at, &c. a declaration in ejectment for the said lands, &c. was delivered to the defendant: nevertheless defendant, not regarding his duty, nor the statute, did not forthwith give notice of the said declaration in ejectment to the plaintiffs, nor to any bailiff or receiver of them, the plaintiffs, but neglected so to do, contrary to the statute; by reason whereof defendant became liable to pay to plaintiffs, as such landlords, the sum of 9000*l.*, being the value of three years' improved rent of the premises so holden in the possession of such tenants, and thereby an action accrued to the plaintiffs to demand and have of and from the defendant the sum of 9000*l.* Plea, nil debet. At the trial before *Garrow B.*, at the last summer assizes for the county of *Monmouth*, it appeared in evidence that the defendant and the other persons mentioned in the declaration, were tenants to the plaintiffs of the premises in question, as assignees of the lessee of a lease, bearing date the 16th of *February*, 1778, for forty years, by which were demised all that messuage, tenement, and lands called *Lower Sirhowey* and *Tanen Sirhowey*; also all that messuage, tenement, and lands called *Penpont Sirhowey*, situate in the parish of *Bedwelty*, in the county of *Monmouth*; together with all houses, out-houses, &c. and all other the appurtenants to the said several tenements and lands belonging, with full and free liberty to the lessee to erect furnaces, forges, &c. upon any part of the premises, for the making and manufacturing of iron: with full and free liberty to the lessee to have, dig, and take from the said lands,

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lands, or from any other tenements of the lessor within the said parish, as much clay, sand, stones, slates, &c. as was necessary for the purpose of erecting such furnaces; and also full and free liberty to and for the lessees, his executors, and assigns, to bore, dig, try, search for, raise, and land all such coal, culm, iron ore, or iron mine, as should or might be found, as well in, upon, or under the said several messuages, tenements, and lands before mentioned, as in, upon, or under the messuage, tenement, and lands therein described, as in the possession of a tenant therein named, in, upon, or under all the wastes or commons called *Gwajmy Pound*, *Rkassanymour Pen*, *Mack Bimore*, and in, upon, and under the lands therein described, in the tenure and occupation of a certain other tenant, and in and upon the lands described as being in the occupation of several other tenants therein named, all which said premises were situate in the parish of *Bedwelty* in the county of *Monmouth*, and for that purpose to dig, sink, and make pits and other works necessary for the working thereof, &c. The rent reserved was 134*l.* per annum, subject to a deduction of 5*l.* It appeared in evidence, that the Defendant had entered into an arrangement with one *Cunningham*, in consequence of which *Cunningham* delivered to him personally in *London*, a declaration in ejectment, upon which judgment went by default, and a writ of possession was executed with a sham levy at *Cunningham's* suit for 10,000*l.* pretended to be due for rent and dilapidations. When the sheriff executed this writ, the defendant accompanied him and pointed out to him the different premises he had held under the plaintiffs, and among others the mines not under the surface of the land demised to him, and the sheriff delivered possession of those mines as well as the other premises.

premises. The premises described in the declaration in ejectment were 2000 acres of arable land, 2000 acres of meadow land, 2000 acres of pasture land, 2000 acres of common land, 2000 acres of land covered with furze and heath, and 2000 acres of land covered with water, with the appurtenances, situate in the parish of *Bedwelty*, in the county of *Monmouth*. It was then proved that on a renewal of the lease of the *Sirhowey* iron works for forty years, they were worth a rent of 2500*l.*; and the plaintiffs contended that the jury were to consider that sum as the improved rack-rent of the premises demised or holden in the possession of the tenant upon which the penalty was to be calculated. The defendant's counsel, on the other side, contended, that the jury must be confined to say what rent the surface of the land demised would fetch on the expiration of the lease, because the coal mines were parcel of the inheritance, and not a portion of the annual produce; and, secondly, he insisted that the declaration in ejectment only applied to the premises specifically demised by the lease, and not to any advantage under the licence to dig contained in it, and therefore, admitting that mines under the lands specifically demised could be recovered in that ejectment, still that mines in which he had a mere licence to dig, could not be so recovered, and that, therefore, the plaintiffs were not entitled in this action to any compensation for any mines under any part of the lands not specifically demised. The learned Judge stated to the jury that the improved rack-rent of the premises was that which the landlord could obtain from a respectable tenant at the time the grievance complained of was committed; that in determining that, they were not bound by the estimate given by the witnesses, but might act upon their own judgment, and

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were at liberty to give a lower sum if they thought fit; and, upon the second point, the learned Judge said, that as the benefit which the tenant took under the lease was the mine under the surface not demised as well as that which was demised, and as that constituted a part of what the plaintiff had to carry to market to make the subject of a reservation, in the shape of an improved rack-rent from a tenant at the expiration of the lease, and as that constituted part of the benefit of which the defendant's conduct was calculated to deprive the plaintiff by withholding notice of the service of the declaration in ejectment, it ought, therefore, to be taken into consideration in estimating the penalty; and that the jury ought not to confine their verdict to the value of the land alone, which was actually demised, but ought to extend it over the whole of the property which the defendant ought to have restored to the plaintiffs, and which they might have had the opportunity of letting to advantage. The jury found a verdict for the plaintiff for 4500*l.* *Jervis*, in last *Michaelmas* term, moved for a new trial, upon the two objections taken at nisi prius. But the Court were of opinion, upon the first point, that the directions of the learned Judge, with respect to estimating the improved or rack-rent, were quite correct. The reserved rent could not be considered as the improved rent, the latter being what the landlord granting, and the tenant taking, might fairly agree on at the time. It is true that it must not be any fanciful rent, nor one which a person having peculiar facilities would pay, but it must be such as a stranger might fairly be expected to give; and, therefore, they refused the rule upon the first point, but they granted a rule nisi on the second; against which rule cause was now shewn, by

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W. E. Taunton (with whom was *Campbell*). The plaintiff is entitled to recover the three years' improved rack-rent, in respect of the mines under the surface demised, as well as those under the surface not demised; for although the declaration did not mention mines *eo nomine*, still it contained the word *land*. And Lord *Coke* says, that under that term any thing may be recovered, to the center of the earth (*a*). Assuming, however, that that might be doubtful, in this case the defendant has put that interpretation upon the declaration in ejectment, by the mode in which he allowed the sheriff to execute the writ of possession. For possession of all the mines, as well under the surface not demised as that demised, was delivered to *Cunningham*, the lessor of the plaintiff in the ejectment, and it is not competent to the present defendant, who concurred in that act, now to say, that one part of the premises were not recoverable in the ejectment. The Court then called upon

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Jervis, Peake, and Puller, for the defendants. This question turns entirely upon the 11 G. 2. c. 19. s. 12., which after reciting that inconveniences had happened to landlords, by their tenants secreting declarations in ejectment, enacts "that every tenant to whom any declaration in ejectment shall be delivered for any lands, shall forthwith give notice thereof to his landlord, under penalty of forfeiting three years' improved or rack-rent of the premises so demised or holden, in the possession of such tenant, to the person of whom he holds." Now

(a) See *Dyer*, 47. a. *Goodtitle, demise of Chester, v. Alker*, Co. Litt. 4. a. *Connor v. West*, 5 Burr. 2672. *Harebottle v. Placock*. Cro. Jac. 21. *Comyn v. Kyneto*, Cro. Jac. 150. *Warden's case*, Het. Rep. 146. *Cole v. Aylott*, Lit. Rep. 299.

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the utmost injury that a landlord can sustain, by withholding from him a declaration in ejectment, is, that he may be dispossessed of the premises recoverable by that declaration; and if the declaration in ejectment does not comprize any of the premises delivered up, the landlord has not been injured by not having an opportunity of defending such an ejectment, because such premises were delivered to the lessor of the plaintiff, not under the ejectment but by the mistake of the sheriff, and the landlord might treat the party in possession as a trespasser. In the case of an ejectment for lands in two different parishes, where the lessor of the plaintiff recovered the lands only in one, and the sheriff by mistake delivered the possession of the lands in both parishes, could it be contended in such an action as this, that the tenant would be liable for the improved rent of the premises in both parishes? that would make him liable not for his own default, but for that of the sheriff.

ABBOTT C. J. The words of the act of parliament do not confine the damages to the treble value of the premises mentioned in the declaration of ejectment, but give such damages in respect of any premises demised or holden in the possession of such tenant. Although this act of parliament, being a remedial act, ought to receive a large and liberal construction, yet I am by no means prepared to say, if the declaration in ejectment was one under the clear and unequivocal construction of which only part of the lands in the possession of the tenant could have been recovered, (as, for instance, the case put in argument of lands in different parishes,) that a plaintiff, in such an action as this, should recover damages for the whole. In this case, however, the sheriff, on reading the writ of possession, might

might reasonably suppose that he was authorized to deliver up the whole; and as the defendant, by his own act, has enabled the sheriff to give such effect to the writ of possession, I think that we ought not, on a very nice construction of the declaration in ejectment, to say that the plaintiffs, in this action, should recover damages only for the premises strictly included in it. If we were to do so, we should thereby say, that the declaration was adequate to the purposes of *fraud*, but insufficient to give a recompense to the person injured by that fraud.

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BAYLEY J. I think, that under the circumstances of this case, it is not competent to the defendant to say that this declaration is not adequate to the purposes for which by his concurrence it has been used. The act of parliament is a remedial law, and was made for more effectually securing the payment of rents, and preventing frauds by tenants; and the clause immediately preceding that upon which the present question turns, refers to the practice of tenants attorning to strangers, and makes such attornments void, unless made in consequence of some judgment at law, &c. Then comes the clause in question, which recites that frequent inconveniences had happened to landlords, by their tenants secreting declarations in ejectments. Now the only inconvenience that could result from so doing, would be, that a change of possession might take place through the medium of a judgment in ejectment, which would give to the person in whose favour that judgment was given, a *primâ facie* title, and so the landlord, upon coming in, would be bound to prove his title to the estate. I apprehend, however, that would not be so in this case; for when it is once made out that there has been a collusive judgment and a fraudulent
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secreting of the declaration by the tenant, the lessor of the plaintiff in the ejectment must be considered as coming in under the tenant, and can be in no better situation. Whatever, therefore, would be sufficient to entitle the landlord to recover against the tenant, would be sufficient to entitle him to recover against the person who by his own and the tenant's fraud has obtained such possession. Here there was collusion between the lessor of the plaintiff and the tenant; and it is a case contemplated by the act of parliament. The remedy given by the act is not confined to cases where the ejectment proceeds to a writ of possession, but will include a case where the landlord, after a declaration delivered to his tenant, and before judgment signed, discovers the fraud, and is let in to defend the ejectment: in such a case he would clearly be entitled to maintain this action. The clause then proceeds to describe the extent of punishment of a tenant guilty of such a fraud; viz. that he shall forfeit three years' improved rack-rent, not merely of the premises described in the ejectment, but of the premises demised. In this case, the injury to the landlord is co-extensive with all the premises beneficially enjoyed by the tenant under his lease. Here the ejectment is to recover, among other things, a certain number of acres of common land. Under certain common lands there are mines. The ejectment might be to recover these mines or not, according as the tenant was or was not in possession of the surface land; for if he was in possession of such land, there can be no doubt that the mines under it might be recovered. It is true that the sheriff, in executing the writ of possession, is to take possession of that which the plaintiff instructs him to do. But still the defendant had it in his power

power to direct the sheriff as to the extent of the premises of which he was to take possession, and having done so, he cannot now (in a case, too, where the landlord has been deprived of the beneficial use of all the premises) be permitted to say that the declaration was not sufficient for the purpose for which he has allowed it to be used. I think, therefore, that as this declaration in ejectment gave to the sheriff at least a colourable power of delivering up all the premises, and as the defendant did not object to the whole being so delivered up, this rule must be discharged.

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HOLROYD J. This question arises upon a demise of certain lands and tenements described in the lease, together with powers and privileges annexed to the lands and tenements so demised, as well as other powers and privileges on other lands not comprehended in the demise; and one entire rent is payable in respect of the lands demised, and the liberties and privileges upon those lands, as well as in respect of the liberties and privileges upon the other lands not demised. These latter, therefore, are liberties and privileges annexed to the lands and premises demised, and are holden with them. Now, although an ejectment will not lie for a liberty and privilege alone, which is a mere incorporeal hereditament, yet, when an ejectment is brought for land, and liberties and privileges are appurtenant to the land, the latter may be recovered with the land, because you may recover in the ejectment all incorporeal things included in the demise, although an ejectment will not lie for the incorporeal things alone. I therefore think that the treble-improved rent contemplated by this act of parliament must be taken to be the treble-improved

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rent of all the premises, corporeal and incorporeal, contained in the lease; and that being so, it appears to me that the plaintiffs, in this case, have recovered no larger damages than they were entitled to, and I therefore think that this rule should be discharged.

BEST J. I entirely agree with my brothers, and with the reasons upon which they have pronounced their judgment. The mines in this case were delivered up by the tenant, and the plaintiffs have been injured by his fraud; and I think that the treble-improved rent of the mines, as well as of the other property, ought to be the measure of damages in this case. And I am clearly of opinion, for the reasons that have been given, that the defendant is estopped by his own conduct, and that the verdict, as it stands at present, is right.

Rule discharged. (a)

(a) The Master having subsequently taxed single costs in this case, *W. E. Taunton* moved that he might review his taxation and allow treble costs, the statute having given treble the rent as damages; and he cited *Deacon v. Morris*. But the Court said that the statute had not given treble damages, but only directed how the single damages should be ascertained; and refused the rule.

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In a public navigable river, 20 years' possession of the water at a given level, &c. is not conclusive as to the right.

DECLARATION stated that Plaintiff before, and at the time of the committing of the grievances thereafter mentioned, was lawfully possessed of a

A verdict obtained by the defendant in a former action, and which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but only evidence to go to the jury.

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certain corn-mill called *The Abbey Mill*, with the appurtenances, situate in the parish of *West Ham*, in the county of *Essex*, and by reason thereof of right ought to have had and enjoyed the benefit and advantage of the water of a certain stream, which, until the committing of the grievances, of right had flowed, and still of right ought to flow, unto the mill of the plaintiff, for the supplying of the same with water for the working thereof, to wit, at, &c. and that the defendant, on the 1st *June*, 1814, and on divers other days and times between that day and the day of exhibiting the bill of the plaintiff, wrongfully *widened, deepened, and enlarged, and caused and procured* to be widened, deepened, and enlarged, a certain ditch or channel called *Potter's Ditch*, leading from and out of the said stream, above the said mill of the said plaintiff; and thereby, on those several days and times, drew off and diverted from the said stream, through the said ditch or channel, a much greater quantity of the water thereof than had before used to flow, or than of right ought then to have flowed, through the said ditch or channel, and kept and continued the same so widened, deepened, and enlarged, and the said quantity of water, so wrongfully and injuriously drawn off and diverted for a long space of time, to wit, from thenceforth hitherto, and thereby prevented the same from flowing to the mill of the plaintiff, and from supplying the same with water for the necessary working thereof, as the same ought to have done, and otherwise would have done. By reason whereof, &c. Plea, not guilty. The cause was tried at the last summer assizes for the county of *Essex*, before *Lens Serjt.*, and a special jury. The plaintiff's mill, and the defendant's premises, which consisted of a wharf, &c., were situate on a stream called *Channel Sea River*. The plaintiff's mill was lower down the

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stream than the defendant's wharf, and between them was situate *Potter's Ditch*, which connected *Channel Sea River* with the *Water-works river*, which last again was connected with the river *Lee*. The defendant, in the summer of 1814, in order to enable his barge to pass to his mill, had employed persons to deepen and widen *Potter's Ditch*, and from that time the plaintiff's mill had ceased to have its usual quantity of water. The plaintiff's witnesses represented that before that time *Potter's Ditch* was not navigable for barges: one of the defendant's witnesses stated that barges had passed along *Potter's Ditch* for the last fifty years. The defendant also gave, in evidence, the record of a judgment obtained in this court in a former action between the same parties, and for the same cause of action. That action was commenced in *Hilary* term, 1817. The declaration was substantially the same as in this. The defendant there pleaded not guilty, and the jury found a verdict for him. It was insisted at the trial that that verdict was conclusive evidence against the plaintiffs, and that it operated as an estoppel. The learned Judge received it in evidence, but refused to nonsuit the plaintiff, giving liberty to the defendant to move to enter a nonsuit. The jury found a verdict for the plaintiff. A rule nisi having been obtained by *Marryat* in last *Michaelmas* term on this ground, and also for a new trial on the ground of a misdirection by the learned Judge, it now appeared from the report that the learned Judge had directed the jury, that in the case of all streams of water the use of which furnished beneficial enjoyment to any individual, the material thing to be attended to was, what had been the actual possession and enjoyment by such person for the last twenty years; and that if water had in fact been enjoyed during that period

period to a certain extent of supply, or at a certain level, no private person was at liberty to do any act which altered that state and condition for the purpose of improving his own estate: that rule applied equally to all streams, whether navigable or not. And he added, that he had left it to the jury to consider, upon the evidence, whether the stream called *Channel Sea River* was navigable, and in what way, whether as a public navigable river, or for the convenience of the adjoining occupiers: that whether navigable or not, each party must use the water in the state in which it was found to be for the space of twenty years invariably; and that a certain benefit so long enjoyed could not afterwards be disturbed.

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The Court, after hearing the report read, asked the counsel for the plaintiff whether they could support that part of the direction of the learned Judge in which he stated to the jury, that each party was bound to use the water in the state it had been found to be for the last twenty years, even although it had been a public navigable river.

Gurney, Curwood, and Bolland, for the plaintiff, stated that that had hardly been made a question at the trial. The material question then was, not whether *Potter's Ditch* had been a *public* navigable stream; but whether it had ever been a navigable stream at all.

The Court said, that it was impossible to estimate the influence that that part of the learned Judge's direction might have had upon the minds of the jury, and that there must consequently be a new trial.

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Marryat, Lawes Serjt., and Comyn, contra. The defendant is entitled to judgment of nonsuit, the judgment recovered by the defendant in the former action being conclusive evidence as against the plaintiff, even upon the general issue. If pleaded by way of estoppel it would be a bar to the action, because it is a judgment directly upon the point, and between the very same parties; and if it be a legal answer to the plaintiff's claim in one case, its effect cannot be varied by the mode in which it was brought before the Court. It was clearly admissible here in evidence under the plea of not guilty; for in an action on the case, that plea puts every thing in issue: it negatives, among other things, that the act done was wrongfully done, and therefore to shew that it was not wrongfully done, the judgment of a Court upon that very question may be given in evidence, and when it is given in evidence the facts disclosed afford a complete answer to the action. In *The Duchess of Kingston's case* (a), Lord Chief Justice *De Grey* lays it down, that the judgment of a Court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court; and Mr. *Philipps* in his *Treatise on Evidence* (b) considers that a judgment will be conclusive evidence between the same parties in those cases where it can be given in evidence without being specially pleaded; and he gives as an instance, among others, that in an action of trespass for mesne profits, the judgment in ejectment is conclusive against the defendant as to the right of possession at the time of the demise laid in the declaration.

(a) 11 St. Tr. 261.

(b) P. 223. 2d edit.

So

So a record of conviction on an indictment against a parish for not repairing a road, will be conclusive evidence, on a plea of not guilty, of the liability of that parish to repair, *Rex v. St. Pancras*. (a) They also cited *Strutt v. Bovingdon* (b), *Kitchen v. Campbell* (c), and the judgment there delivered by Lord Chief Justice *De Grey* and, the judgment of Lord *Mansfield* in *Bird v. Randall* (d), where it is laid down that a judgment recovered need not be pleaded in an action on the case, but may be given in evidence under the general issue.

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ABBOTT C. J. I am of opinion that there ought to be a new trial in this case, but that there ought not to be judgment of nonsuit. The learned Judge left it to the jury, on the evidence, to consider whether the stream called *Channel Sea River* was navigable, and in what way, whether as a public navigable river or for the convenience of the adjoining occupiers; and he further added, that whether navigable or not, he thought each party was bound to use the water in the state in which it was found to be for the space of twenty years invariably, and that a certain benefit so long enjoyed could not afterwards be disturbed. In that direction, it appears to me, the learned Judge was mistaken; for if it be admitted that this is a public navigable river, and that all his majesty's subjects had a right to navigate it, an obstruction to such navigation for a period of twenty years would not have the effect of preventing his majesty's subjects from using it as such. It has been said that the evidence shews plainly that this never had been a navigable river; that fact, however, is not found

(a) *Peakes N. P. C.* 219.(b) *5 Esp.* 57.(c) *3 Wils.* 304. *2 Bl.* 830.(d) *3 Burr.* 1353.

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by the jury, and I cannot now decide it. I find upon the report that the jury were misdirected in point of law; and it is impossible for me to say what weight that direction had on their minds, and therefore I think there ought to be a new trial. Upon the second point I am of opinion that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff upon the plea of not guilty. It would indeed have been conclusive if pleaded in bar to the action by way of estoppel. In that case the plaintiff would not be allowed to discuss the case with the defendant, and for the second time to disturb and vex him by the agitation of the same question. But the defendant has pleaded not guilty, and has thereby elected to submit his case to a jury. Now if the former verdict was proper to be received in evidence by the learned Judge, its effect must be left to the jury. If it were conclusive indeed, the learned Judge ought immediately to have nonsuited the plaintiff, or to have told the jury that they were bound, in point of law, to find a verdict for the defendant. It appears to me, however, that the party, by not pleading the former judgment in bar, consents that the whole matter shall go to a jury, and leaves it open to them to inquire into the same upon evidence, and they are to give their verdict upon the whole evidence then submitted to them. I am aware that in *Bird v. Randall* Lord Mansfield is reported to have said that a former recovery need not be pleaded but will be a bar when given in evidence. I cannot, however, accede to that; for the very first thing I learnt in the study of the law was that a judgment recovered must be pleaded: that has so strongly engrafted itself on my mind as a general principle, that nothing I have
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heard in argument this day, has shaken it. I am, therefore, of opinion, that there ought not to be a nonsuit.

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BAYLEY J. I am of the same opinion. I think that we are not warranted in saying that there was not evidence, at least to go to the jury, to say, whether this was not a navigable river; and if it was a navigable river, then an obstruction for twenty years is not a bar to a public right. The direction of the learned Judge, therefore, upon that point, cannot be supported, and, consequently, there must be a new trial. It seems to me, that the other question admits of no fair doubt, when you consider the issue raised upon the pleadings. An action is here brought, as it is alleged, for the same cause in respect of which a former action had been brought, and in which a verdict was obtained by the defendant. Now a defendant ought not, in point of law, to be twice vexed for the same cause of action; and he would have had a right, if he had thought fit, to have pleaded the former verdict by way of estoppel, and thereby have shewn that the plaintiff was not at liberty to try that question a second time, which had been tried before and decided against him. Instead, however, of putting himself on that estoppel, he merely says, that he is not guilty of the offence imputed to him; and, upon that issue, the jury are to try, not whether the plaintiff is estopped from trying the question, but whether the defendant be guilty or not. Upon that issue, the defendant may prove, that the act imputed was not done by him, and that another jury were of opinion that he was not guilty; and, for that purpose, he may give in evidence the judgment in the former cause, for the consideration of the second jury. The question, however,

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however, for the second jury (when the defendant has chosen to plead the general issue) is, whether the defendant be guilty or not? and the question raised upon that issue, in an action on the case is, whether the plaintiff had or had not any cause of action at the time of the commencement of the suit? Now the judgment for the defendant in a former action for the same cause, does not necessarily prove that the plaintiff has no cause of action. It decides nothing unless by way of estoppel. In *Outram v. Morewood* (a), where this subject was very fully considered, Lord *Ellenborough* C. J., in giving the judgment of the Court, takes this distinction, and states expressly, that a former judgment, if properly pleaded by way of estoppel, would be conclusive, but if only offered in evidence it would not be so. For these reasons, I am of opinion, that, upon this issue, the judgment in the former verdict was evidence only to go to the jury.

HOLROYD J. If the place in question was ever a public navigable river, I apprehend that its ceasing to be used as such for twenty years, and being, during that time, in a condition which is inconsistent with its being used as a public navigable river, would not extinguish the public rights, if they did exist previously to that time. An act of parliament is the only means by which such a public right can be determined. As there was, therefore, evidence for the consideration of the jury, whether this had been a public navigable river, and as the learned Judge told them that if it were a public river, still that twenty years' possession was to be binding on the rights of the parties, it appears to me that

(a) 3 *East*, 346.

there

there must be a new trial. With respect to the other question, I think that there ought not to be a nonsuit. There were two modes, by either of which the defendant might defend himself. There having been a former action, in which he had succeeded, he might have alleged that he was not to be called upon to defend himself again for the same cause. If he chooses to adopt that mode of defence, he must plead it in bar; and say that the other party is not at liberty to call upon him to answer again that which he had before called upon him to do, when a verdict was given in his favour. If, however, he declines that mode of defence, and submits to answer for the cause of action alleged, and defends himself by saying that the plaintiff has no ground of action; he then leaves the question to the jury, and they are to try, not whether there was a former action for the same cause, but whether the plaintiff has such a ground of action as he alleges in his present declaration. A party may have matter which he may either give in evidence, or which, if pleaded, would be an estoppel; but when he puts it to the jury to find what the fact was, it is inconsistent with the issue which he has joined, for him to say that the jury are estopped from going into the enquiry. He may, however, use the former verdict as evidence, and pregnant evidence, to guide the jury who are to try the second case, to a conclusion in his favour. But if, notwithstanding the prior verdict and judgment, the jury think the case is with the plaintiff, they are not estopped from finding the verdict accordingly. In *Goddard's case*(a), the plaintiff, as administrator of *Newton*, had brought debt upon bond made to the in-

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(a) 2 Rep. 4.

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testate, bearing date 4th *April*, 24th *Eliz.* The defendant pleaded that the intestate died before the date of the bond, and so concluded that the writing was not his deed, upon which they were at issue. The jury found that the defendant did deliver it as his deed 30th *July*, 23d *Eliz.*, and found the tenor of the deed verbatim, that it was dated 4th *April*, 24th *Eliz.*, that the intestate was living, 30th *July*, 23d *Eliz.*, but that he died before the date of the bond, and prayed the advice of the Court, whether this was the defendant's deed; and it was adjudged his deed; and the reason given is, "that although in pleading the obligee cannot allege the delivery before the date, because he is estopped to take an averment against any thing expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude one to say the truth, and therefore jurors cannot be estopped, because they are sworn to say the truth." In *Trevi-
van v. Lawrence* (a), it was held, that if a party will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for they are to find the truth of the fact which is against him; and in *Buller's Nisi Prius* (b), it is laid down, that the jury cannot find any thing against that which the parties have affirmed and admitted of record, though the truth is contrary; but in other cases, though the parties be estopped to say the truth, the jury are not; as in *Goddard's* case, where the bond was dated nine months after the execution, and after the death of the obligor. I think, therefore, that upon principle as well as upon authority, the former judg-

(a) *Salk.* 276.(b) *P.* 298.

ment was not conclusive against the plaintiff upon this issue, and that the learned Judge, therefore, did right in receiving the evidence, and suffering the trial to proceed. The rule, therefore, should be absolute for a new trial only, but not for a nonsuit.

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Rule absolute for a new trial. (a)

(a) *Best J.* had left the court.

SANDILANDS and Others, Executors of HOWDEN,
against MARSH.

ASSUMPSIT. The declaration stated that *I. Howden* deceased employed the defendant as his agent to lay out 4000*l.* in the purchase of an annuity, and to receive the arrears thereof, and that in consideration thereof, and of a certain commission, defendant promised to guarantee the payment of the annuity, and alleged a breach in not having so guaranteed. Plea, general issue. At the trial before *Abbott C. J.* at the adjourned sittings at *Guildhall* after last *Michaelmas* term, it appeared that the defendant, who was a navy agent, had formerly been in partnership with a *Mr. Creed*, and that the firm of *Marsh and Creed* had been the navy agents to *Mr. Howden*. On the 12th *September*, 1811, *Mr. Creed* wrote the following letter to *Mr. Howden*:
“ I have an opportunity of employing your remaining

Where one of two partners makes a contract as to the terms on which any business is to be transacted by the firm, although such business is not in their usual course of dealing, and even contrary to their arrangement with each other, and the business is afterwards transacted by or with the knowledge of the other partner: Held that he is bound by the contract made by his partner.

The deeds and other assurances,

a memorial of which is required by 17 G. 3. c. 26. to be enrolled, are those to which the grantor of the annuity is a party, or which are entered into by a third person at his instance and request, or on his behalf; and, consequently, where a third person, wholly unconnected with the grantor, guaranteed, in consideration of a certain commission, the payment of an annuity to the grantee: Held that such guarantee need not be enrolled.

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property in the stocks for three or four years in a way that will double, or nearly so, the income you derive from that source. It is by annuity of 8 per cent. per annum on three lives, secured on property, the receipts of which pass through our hands and will be guaranteed by our house, and not redeemable till after three years. The party granting the annuity is in the receipt of a clear unincumbered income of above 12,000*l.* per annum, and will, as soon as he can after the lapse of three years, redeem the annuity, so that your capital remains untouched. For our trouble in the business, and for guaranteeing the punctual half-yearly payment of the annuity to you, we should expect a commission of 5 per cent., but the benefit you would derive from the arrangement would very well allow of it. *Windsor's* and this annuity would soon clear off the advance on our account, and leave your income materially improved. If you see this business in the light I do, and will say aye or no by return of post, I will either go on with it and send you down a bank power for sale of your stock, or else secure it for some other friend." This letter was signed *Richard Creed Howden* immediately accepted this offer, and a joint power of attorney was transmitted, empowering *Marsh* and *Creed* to sell the stock; and the stock was accordingly sold out on the 7th *January*, 1812. On the 23d *January*, 1813, the annuity in question was purchased of Mr. *Joshua Rowe*, and after having been paid for about two years, became in arrear. *Howden* died 7th *March*, 1813. By a letter dated 10th *April*, 1813, signed *Marsh* and *Creed*, in answer to an application made on the part of Mr. *Howden's* representatives, they stated in substance as follows: — " He has two annuities,
one

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one yielding a clear 400*l.* per annum, payable quarterly, exclusive of the amount of the annual premium on the insurance of the life of Mr. *Rowe*, the grantor at the *Equitable Insurance Office*, and the purchase-money for which was 4000*l.* in place of 5000*l.*, which we informed Mr. *Howden* we should give for it. This is guaranteed by our house on a commission, and is not determinable for three years." Neither of the above letters were entered in *Marsh* and *Creed*'s letter-book, nor did it appear that *Marsh* had personally any knowledge of the guarantee. It was proved, that it was no part of the ordinary business of navy agents to deal in annuities. The charge of 5 per cent. commission had never been made, but only 2½ per cent., the usual commission of navy agents, had been charged in the different accounts transmitted by *Marsh* and *Creed*. In those accounts, however, there were found several items, referring to the sale of the stock and the receipt of the annuity. Under these circumstances, it was contended, first, that this guarantee by *Creed* could not bind his partner, *Marsh*; and, secondly, that if it could, it was a security which ought to have been enrolled under the provisions of the annuity act. The learned Judge overruled these objections and left it to the jury to say, whether, under the circumstances of the case, *Marsh* was cognizant of the transaction as to the purchase of this annuity, although he might be ignorant of the facts of the guarantee itself, telling them, that in that case he thought the defendant was liable. The jury found this fact in the affirmative, and the plaintiffs obtained a verdict. The defendant had liberty to move to enter a nonsuit on both points; and a rule nisi to that effect having been obtained by *Marryat* in last *Hilary* term,

Scarlett

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Scarlett and Adams now shewed cause. They contended, that the case had been properly left to the jury to say, whether *Marsh* was or was not cognizant of the transaction; and the jury have found that he was. If so, he must be bound by the representations and acts of his partner in it. As to the second point, the distinction is, that only those securities which come from the grantee or his sureties are required to be registered; but this guarantee was wholly independent of, and for any thing that appears unknown to the grantor. He was not in any degree responsible over either to *Marsh* or *Creed*, in case they were called upon by *Howden* to pay the annuity. Then it did not require to be memorialized, because the only object of the act was for the further protection of the grantor, to record all the securities coming directly or indirectly from him.

Marryat and Wilde, contra. One partner has no power to bind another by a guarantee of this sort. It was not an act done in the ordinary course of business, and its operation might last beyond the duration of the partnership, or even the life of the parties. There is no pretence for saying that *Marsh* was cognizant of the circumstances of the guarantee itself. The letters containing it were never entered in the letter-book of the firm; and the mere receipt of the 2½ per cent. on the money, which was the consideration for the annuity, is not sufficient of itself to charge him with this guarantee. The 5 per cent., which was the consideration for it, never was received at all. All *Marsh's* acts are perfectly consistent with the ordinary course of dealing and no more. The case of *Duncan v. Lowndes and Another* (a), is pre-

(a) 3 Campb. 478.

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cisely in point. But supposing it to be a guarantee binding on *Marsh*, still the plaintiff cannot recover, not having complied with the annuity act. (a) It would defeat all the provisions of that act, if this did not require to be memorialized; a person meaning to grant an annuity, would then only have to guarantee an annuity granted by a pauper in order to evade the act. The case of *Rosher v. Hurdis* (b) shews, however, that this is not the law. But there is another objection. The guarantee, at all events, depends upon the second letter alone, for there is nothing to connect the first and second letters together. The price is different, and they relate to different annuities. If so, then inasmuch as the second letter only states that a guarantee has been given, but omits the terms of the guarantee, it is not sufficient to take the case out of the statute of frauds. [Abbott C. J. Can it be contended, that if a person writes a letter offering to purchase an annuity, and to guarantee its payment, and requesting a power to sell out stock to be sent for that purpose, that he will not, after his proposal has been acceded to, and the stock has been sold out, be liable to make good his guarantee, because exactly the same annuity as that proposed has not been bought?] The question is not whether he would not be bound to make compensation, but whether he would be liable on the guarantee. The second letter admits that a guarantee was given, but is wholly silent as to its terms. *Wain v. Warlters*. (c)

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ABBOTT C. J. This case has been very fully and ably discussed at the bar; but I am of opinion that the

(a) 17 G. 3. c. 26.

(b) 5 T. R. 678.

(c) 5 East, 10.

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rule must be discharged. Two material questions have been made; the first of which, and the most important and extensive in its consequences, is, whether this defendant shall be held to be bound by the guarantee given without his knowledge, by his partner, *Creed*; and if the verdict of the jury, finding him to be so bound, be not sustainable, it will be very dangerous hereafter to deal with a partnership; for the business in each department of a firm is generally transacted by one partner only. It has, undoubtedly, been held, that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners. In this case, the proper business of *Marsh* and *Creed* was, to receive the money due from the navy board to their customers, and their dividends in the public funds; upon which business they charged *Howden* with a commission of $2\frac{1}{2}$ per cent. It was no part of their ordinary business to guarantee annuities, or to lay out the money of their customers in the purchase of them. Under these circumstances, the original proposal was made by *Creed*, in answer to which the joint power of attorney was transmitted to *Marsh* and *Creed*, under which the stock was afterwards sold. Now that sale must have appeared in the partnership books; and if that fact were doubtful, it is proved by the balance stated in the accounts transmitted by the partnership: that sale, therefore, and the fact that the proceeds had been laid out in the purchase of an annuity, either were actually known or ought to have been known by *Marsh*. Now, if that whole transaction was known to him, the guarantee,
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which is connected with it, becomes, in point of law, an assurance made by one partner with reference to business transacted by both; and, according to the rule previously stated, it will bind both. To illustrate this position, a case may be put, where two persons in partnership for the sale of horses, should agree between themselves never to warrant any horse; yet, though this be their course of business, there is no doubt, that if, upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be thereby bound. As to the second question, whether this guarantee ought to have been enrolled according to the provisions of the annuity act: I agree that that statute ought not to receive a narrow construction, so far as the interest of the grantor of the annuity is concerned. Every security, therefore, given by him or on his behalf, and for which the money received by him is the consideration, must be enrolled. But the consideration for this promise is wholly distinct from that given for the annuity. It is the payment of an additional commission of $2\frac{1}{2}$ per cent.; whereas the consideration for the annuity is the sum of 4000*l*. It is wholly unconnected with the grantor, and collateral to his interest, and does not, I think, require to be enrolled. I am, therefore, of opinion, on both grounds, that this rule should be discharged.

BAYLEY J. I have entertained considerable doubts, during the discussion of this case, but I am now entirely satisfied on both points. It is true that one partner cannot bind another out of the regular course of dealing by the firm. But where the assurance has reference to business transacted by the partnership,

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although out of the regular course, it is still within the scope of his authority, and will bind the firm. Now if we apply that rule to this case, we find a proposal by *Creed*, concerning business to be transacted by the house, in which he states the terms on which it will be done. This proposal is acceded to, and the business, as appears by the accounts transmitted, is transacted by the house. If so, it must have been transacted on the terms stated in the letter of *Creed*; and, if *Marsh* and *Creed* were thus agents in laying out *Howden's* money in the annuity, they must be bound by the terms specified by *Creed*. For this is a representation made by one partner as to the terms upon which the business is to be done by the firm. This is made still more clear by the letter of the 10th *April*, 1813. It is suggested, indeed, that this may have reference to some other guarantee than that of the letter of 12th *September*, 1811. But if so, it was for the defendant to have proved that fact. Then it is contended, that the second letter by the firm does not specify the amount of the commission, and that this case falls within *Wain v. Warlters*. But that difficulty is removed, by connecting it with the former letter, in which the terms are specified. The stamp acts proceed on the same principle, that an agreement may be inferred from several letters; and therefore direct that the stamping of one shall be sufficient. The other question is, whether this guarantee ought to have been enrolled. The case of *Rosher v. Hurd* does not in terms shew whether the security there was not given at the instance of the grantor. And there is a material difference between sureties for a grantor who are identified with him, and other persons wholly unconnected with him. If, in this case,

Rowe had been told that *Marsh* and *Creed* were to be his guarantees, and he had given them any consideration for so doing, the case would be different. But here these parties guarantee, not at the instance of the grantor, but of the grantee. I am of opinion that this is not within either the terms or the spirit of the annuity act.

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HOLROYD J. I am of the same opinion. It was properly left to the jury to say whether *Marsh* was cognizant of the contract to lay out this money in the purchase of an annuity; and then whatever engagements *Creed* might make with reference to it would bind *Marsh*; for, by his knowledge of it being found by the jury, it becomes for this purpose part of the partnership business, as much as any transaction in the ordinary course of dealing. The first letter seems to me to be applicable to any annuity to be purchased with the money to be raised by sale of the funded property; and that the parties themselves so considered it, appears from the second letter. We have, therefore, a right to connect these two letters together, and, by so doing, the objection that the terms of the guarantee are not specified in the second letter is removed. The great difficulty in my mind is as to the enrolment, and it arises from this guarantee having been originally mentioned as one of the terms upon which the grantee was to advance his money. It does not, however, appear that the grantor had any knowledge of it, and that makes a material difference. For there being nothing in the letter which imports that the terms of the proposal come from the grantor, it may be considered as wholly collateral to the transaction, and as no part

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of the condition on which the annuity was granted by him. The words of the act are "that a memorial of every deed, &c. *whereby any annuity shall be granted*, shall be enrolled;" and the warrants of attorney, of which the act subsequently speaks, are those given by the grantor. I think, therefore, that the assurances meant in this clause are those connected with the grantor; and that as this guarantee was wholly unconnected with him, it did not require to be enrolled.

BEST J. I am clearly of the same opinion on both points. If we were to decide the first point in favour of the defendant, we should place persons who have occasion to deal with partnerships in a new and difficult situation: for, unless they made inquiry from every one of the partners whether they assented to the partnership transaction, which in many cases would be impossible, they would have the security of the individual only, and not that of the firm. In this case it appears that *Marsh* and *Creed* acted not merely as navy agents, but also in the procuring of this annuity, and that they have received an advantage from the transaction. For, although it is said they did not receive the 5 per cent. commission, yet, at all events, they were benefited by receiving 2½ per cent. commission on a larger sum arising from this annuity. *Marsh*, therefore, who has derived an advantage from the engagement entered into by his partner, must be bound by the consequences of it. This question, therefore, was properly left to the jury, who have, in my opinion, found the right verdict. As to the second point, it seems to me that the object of the annuity act was to protect inexperienced persons from the frauds of those
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who lent money on annuities; and the provision for the enrolment of the securities being intended for the benefit of the grantor only, I think it is necessary to enrol those securities alone, which shew the extent of his responsibility. Now that was necessary in *Rosher v. Hurdis*; for it may be concluded (though it is not expressly so stated in that case) that the grantor was there liable over to the obligor of the bond. But here there is no such liability on the part of *Rowe* to *Marsh* and *Creed*. I am, therefore, of opinion that it was not necessary to enrol this guarantee, and that on both grounds this rule must be discharged.

Rule discharged.

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SANDILANDS
against
MARSH.

TOOVEY, Assignee of MAXTON, *against* MILNE.

Monday,
June 14th.

MONEY had and received. Plea, general issue. At the trial before *Abbott C. J.*, at the sittings after last *Easter* term, at *Westminster*, it appeared that the circumstances of the case were these. The act of bankruptcy was a lying in prison two months. During the continuance of the imprisonment, the bankrupt being desirous of settling with his creditors, sent his wife to borrow of the defendant, his brother-in-law, 120*l.* for that purpose. The money was accordingly lent, but the purpose failing, 95*l.* was afterwards repaid to the defendant by the bankrupt, who still remained in prison. It did not appear that the individual notes composing the 95*l.* were any part of the notes originally advanced by the defendant, nor was there at the time of the advance any express stipulation, that if the object was not

Act of bankruptcy by lying two months in prison. During the imprisonment *A.* advanced to the bankrupt money for the purpose of settling with his creditors. The purpose failing, a part of the money was repaid to *A.* by the bankrupt: Held that this repayment was protected, and that the assignees could not recover the money so repaid.

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attained the money should be restored. *Abbott C. J.* thought that this was money advanced for a special purpose, and that it did not pass to the assignee, and that therefore the repayment was protected, and non-suited the plaintiff. And now

Gurney moved for a new trial. If these had been the identical notes which had been before advanced by the defendant, or if at the time of the advance there had been any express stipulation to restore the money, in case the object should not be attained, the case might have been different. But neither of these circumstances exist here. Then this is the ordinary case of money in the bankrupt's hands lent to him by the defendant, which is the property of his assignee, and consequently this repayment to the defendant cannot be protected. The defendant must claim like the other creditors, and receive his proportionate dividend.

ABBOTT C. J. I thought at the trial, and still think, that the fair inference from the facts proved was that this money was advanced for a special purpose, and that being so clothed with a specific trust, no property in it passed to the assignee of the bankrupt. Then the purpose having failed, there is an implied stipulation, that the money shall be repaid. That has been done in the present case; and I am of opinion that that repayment was lawful, and that the nonsuit was right.

Rule refused.

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Lord CHURCHILL *against* HUNT.Monday,
June 14th.

DECLARATION stated that before the publishing of the libels thereafter set forth, a certain carriage, in which one *Elizabeth Shewin* was riding, was passing on a certain public highway called, &c., and that plaintiff was also driving a certain other carriage called a dennett, and thereupon it happened, *without any negligence, default, or furious driving on the part of the plaintiff*, that the two carriages came in contact together, by means whereof the carriage in which the said *E. S.* was riding was unavoidably and accidentally overturned, and the said *E. S.* was thrown out of the carriage upon the ground, and was so grievously injured that she died, to wit, on, &c., at, &c.; yet defendant, intending, &c., to cause it to be suspected and believed that the said accident was occasioned by the carelessness, negligence, and furious driving of the plaintiff, and also to cause it to be believed that it was proved in evidence before the coroner's inquest which sat on the body of the said *E. S.*, that her death was occasioned by the misconduct of the plaintiff, falsely, &c., published of and concerning the said plaintiff, and of and concerning the said

Declaration alleged that before the publishing of the libel, a carriage, in which one *E. S.* was riding, was passing on a certain highway, and that plaintiff was there driving another carriage, and that it happened, without any negligence, fault, or furious driving on the part of the plaintiff, that the two carriages came in contact together, whereby the carriage in which *E. S.* was riding was overturned, and the said *E. S.* was injured. The declaration then proceeded to allege that the defendant published a libel of and concerning the plaintiff, and of and concerning the

said accident, and that allegation was made in every count of the declaration. The defendant pleaded, 1st, Not guilty; 2dly, Justification to the whole of the libel in the first count of the declaration, and stated that the accident mentioned in the supposed libel was the same accident mentioned in the introductory part of the declaration, and that it was occasioned by the careless and furious driving of the plaintiff. The defendant then pleaded a justification only as to part of the libel contained in the second count, that the said *E. S.* had been thrown from a chaise, owing to the hard driving of the plaintiff; but there was no justification as to the other part. The jury found a verdict for the defendant on the justification; and they found a verdict for the plaintiff as to that part of the libel to which no justification was pleaded: Held that the word "accident" in this declaration meant the collision of the carriages only, and that the allegation that that collision was occasioned by the furious driving of the plaintiff, was a separate and distinct allegation, and that the verdict therefore was right.

accident,

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accident, and of and concerning the evidence given before the coroner's inquest, a certain libel containing the matter following of and concerning the said plaintiff, of and concerning the said accident, and of and concerning the said evidence: (that is to say,) "Furious driving. — A reader of *The Examiner* trusts that the editor will not fail to notice, in his next publication, the very melancholy accident which occurred in the *King's Road* on *Wednesday* in the last week, occasioned by the furious and careless driving of a certain young nobleman, Lord *Charles Spencer Churchill*, by which two persons were much hurt, and a female (meaning the said *E. S.*) hurried suddenly into eternity. The evidence given before the coroner having fully proved that this accident was caused entirely by the misconduct of this nobleman (meaning the plaintiff), a son of the Duke of *Marlborough*, it was with the utmost disgust that the writer read a paragraph in *The Morning Post* of yesterday (meaning a certain public newspaper so called), which, with reference to some observations on this case which have appeared in *The Morning Chronicle* and *Times* (meaning two public newspapers), states that those observations are infamous and calumnious falsehoods, and that steps are taken to punish the author, &c. &c. Now, as the evidence taken on oath (meaning the evidence given before the coroner's inquest which sat on the body of the said *E. S.*) bears out the remarks made in those papers, it cannot but be considered an impudent attempt of authority to stifle inquiry in this melancholy case. The writer begs to call the editor's attention to the subject, feeling assured that the conduct of those patriots who, to attract the attention of pedestrians, exercise their talents as coachmen to the imminent peril of the
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 Lord
 Churchill
 against
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more humble part of the community, deserves public reprobation." Second count. That defendant falsely, &c., published a certain other libel containing the matter following, of and concerning the plaintiff, and of and concerning *the said accident*. "We lately noticed the dreadful death of Mrs. *Shewin* (meaning the said *E. S.*), who was thrown from the chaise owing to the hard driving of Lord *S. Churchill*. We are informed, but we can hardly believe the relation, that though this young nobleman (meaning the plaintiff) was fully aware of the shocking death of the lady (meaning the said *E. S.*), he, on the very evening of the catastrophe, attended a public ball." Plea first, not guilty. Second, as to the supposed libel in the first count mentioned, the defendant pleaded, that the said *E. S.* in that count mentioned, one *Isaac Tooke*, and *Jane Gurling*, on the 20th May, 1818, were riding in a certain carriage then travelling on the said public highway called, &c., and that the accident in the said part of the supposed libel mentioned and referred to, is the said accident mentioned in the said introductory part of the said declaration, and that the same happened and occurred by reason of the said two carriages coming in contact with each other; and that in consequence of the said accident, the said *I. Tooke* and *J. G.* were much hurt, and the said *E. S.* was so much hurt that she afterwards died. Defendant then pleaded that the said accident was occasioned by the furious and careless driving of the plaintiff on the occasion aforesaid; and he further pleaded, that the evidence before the coroner fully proved that the said accident was caused entirely by the misconduct of the plaintiff to wit, on, &c., at &c. The justification then set out the several paragraphs in *The Morning Chronicle*,

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 Lord
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Chronicle, The Times, and The Morning Post. There was a similar justification to the first part of the libel stated in the second count; but there was no justification as to that part of the libel which charged the plaintiff with having been at a ball on the very evening of the accident. The cause was tried before *Bayley J.*, at the last *Westminster* sittings, when the jury found a verdict for the plaintiff, damages 50*L.*, as to that part of the libel which was not justified; but upon the justification, they found a verdict for the defendant.

C. F. Williams now moved to enter a verdict for the defendant on all the issues. The declaration states, that it happened without any negligence or furious driving of the plaintiff, that the two carriages came in contact, and accidentally ran against each other. The accident mentioned in the declaration, therefore, is an accident that happened *without the furious driving of the plaintiff*, and that is part of the description of the accident concerning which the libel is alledged to be written. The second count alleges that the defendant published a libel of and concerning the *said* accident, *i. e.* the accident mentioned in the inducement to the declaration. That accident is one which was not occasioned by the furious driving of the plaintiff, and the libel is of and concerning that accident. This is a connected proposition which presents the libel to the cognizance of the jury, and forms part of the description of the accident itself, and that proposition is incorporated into the second and other counts, because the libel is alleged there to be of and concerning the *said* accident. Every count, therefore, in the declaration in fact avers, that an accident happened by two carriages coming in contact with each other,

other, without the *negligence, default*, or furious driving of the plaintiff. The jury, by finding that the accident was occasioned by the furious driving of the plaintiff, have in effect found that there was no such accident as that alleged by the plaintiff in his declaration; the legal effect of the finding of the jury is, that the defendant did not publish any libel of and concerning any such accident, and he cited *Rex v. Horne.* (a) *Peppin v. Solomon.* (b)

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against
HUNT.

ABBOTT C. J. It seems to me, that the word accident, as here used, was meant to express the event that occurred, viz. the collision of the carriages; the plaintiff, indeed, alleges, that that happened without his fault. That, however, is a distinct allegation, and forms no part of the description of the accident itself. The jury, therefore, by finding a verdict for the defendant on the justification, have not found that there was not any such accident as that mentioned in the declaration, but have merely negatived a distinct and separate averment, viz. that it happened without the fault or furious driving of the plaintiff, and therefore the verdict for the plaintiff is right.

BAYLEY J. The allegation here is, in substance, a divisible allegation. It states, that the two carriages came in contact together, and accidentally ran against each other; and it also alleges, that this occurred without any fault of the plaintiff. That latter circumstance forms, itself, a distinct and separate allegation, which the jury have negatived. They have, however,

(a) *Cowp.* 672.(b) 5 *T. R.* 496.

found

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HUNT.

found that the libel was published of and concerning the said accident, viz. the collision of the carriages.

HOLROYD J. I am of the same opinion. It is no part of the description or definition of the accident that it occurred without the fault of the plaintiff, it is merely a circumstance connected with it, and is an unnecessary allegation concerning it. The defendant in his justification considers it as a proposition distinct from the accident itself; for he states, that the accident mentioned in the supposed libel, and that mentioned in the declaration, are the same, and that that accident was occasioned by the furious driving of the plaintiff, so that he considers the collision of the carriages to be the accident, and the plaintiff's furious driving to be the cause of that accident. The jury, therefore, by finding for the defendant, on the justification, have not found that no such accident occurred, but merely that the cause of that accident was that alleged in the libel and justification. It is not inconsistent with this finding, that the libel in the second count was of and concerning the said accident, *i. e.* the collision of the carriages; and the verdict, therefore, ought to stand.

BEST J. The question here is, whether the word accident includes only the event which occurred or the circumstance which led to that event. I am of opinion that, as used in this declaration, it means only the former, and, consequently, that the verdict for the plaintiff is right.

Rule refused.

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In re BADGER.

Tuesday,
June 15th.

THE submission to arbitration was of all matters in difference in a suit in Chancery, and of all other matters in difference between the parties. And the arbitrators, in taking the account, which consisted of different items relating to monies received for rents of houses, charges for work and labour, business done, and materials found, &c. &c., had allowed interest on both sides of the account. A rule nisi having been obtained for setting aside their award on this ground,

Gaselee and *D. F. Jones*, were about to shew cause, but were stopped by the Court, who called upon

Scarlett and *Bayly*, contra. The arbitrators were not authorised by the submission to award interest, and unless that power was expressly given to them they could do no more than the courts of law or equity would have done in case the question had come before them. Now it is quite clear that they would not have allowed interest in this case, and they cited *Boddam v. Riley*. (a) If the party had made his demand sooner, he might, by obtaining a settlement, have been entitled to interest; not having done so, he must take the consequence of his own neglect. In bills of exchange, the interest is allowed conformably to the custom of merchants. Here the arbitrators have infringed a rule of law by allowing interest, and their award must be set aside.

An arbitrator is not bound by a rule of practice, adopted by courts of law for general convenience; and, therefore, where on a reference of a Chancery suit, and all matters in difference between the parties, the arbitrator had allowed interest, (when it would not be allowed by a court of law or equity,) the Court refused to set aside the award on that ground.

(a) 2 Br. Ch. Cas. 2.

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In re
BADGER.

ABBOTT C. J. The Court will not set aside the award in consequence of the allowance of interest. If an arbitrator acts contrary to a general rule of law, it is undoubtedly the duty of the Court to set aside his determination. But there is a material distinction between those rules which are founded on the immutable principles of justice, from which neither the Court nor an arbitrator can be allowed to depart, and those which depend on the practice of the Court: from the latter, indeed, the Court will not depart, because it is of great importance in courts of justice to adhere to them, even though it may operate to the prejudice of some particular case. For by abiding by general rules we avoid that uncertainty which would be productive of very great inconvenience to the suitors of the court. But an arbitrator, to whom a particular cause is referred, is not placed in this situation; he is not, as it seems to me, bound by those rules of practice which are adopted by the Court, for those reasons which I have stated. And as this rule of not allowing interest on unliquidated accounts is a rule of practice, I think that the arbitrators in this case were not bound by it. Then the question arises, whether they were excluded from allowing interest by the terms of this submission. I think they were not. The submission is of a suit in chancery, and all other matters in difference. That gave them an authority to adjust the account between the parties; and an authority to do that carries with it an implied authority to allow interest unless expressly excluded by the terms of the submission. This rule must therefore be discharged.

BAYLEY J. concurred.

HOLROYD

HOLROYD J. The ground for making a general rule is, that in the great majority of instances such rule is productive of advantage, and though it may be productive of inconvenience in a particular case, it is still abided by in order to avoid that uncertainty which would otherwise occur, and which is worse. But this reason does not apply to a case before an arbitrator whose duty it is to do justice, according to the circumstances of the particular case, and no mischief can arise from his not abiding by a general rule. I think that this is a case in which the arbitrators might allow interest.

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In re
BADGER.

BEST J. The same principle which governs our present decision will be found in the case of *Prentice v. Reed*. (a) It does not appear that the arbitrators here have violated any general rule of law, but they have only not complied with the practice of the Court. It is this very circumstance which, in many cases, makes a decision by an arbitrator preferable to that of the Court; viz. that the former is not bound by the strict rules of practice, but may do full justice according to the particular circumstances of the individual case.

Rule discharged.

(a) 1 Taunt. 151.

1819.

Tuesday,
June 15th.

The KING *against* The Justices of SALOP.

Where a statute gives a party aggrieved a right of appeal, on giving security to a specified amount, he may enter and respite his appeal at the next sessions, after having given such security, without notice to the other side; but after the appeal has been respited, if he does not give the usual notice of trying it, the sessions will be authorized to dismiss it altogether.

COMYN had obtained a rule nisi for a mandamus to the sessions to enter continuances, and hear the appeal of *John Rogers*, against the conviction of a magistrate, under 52 G. 3. c. 93. sched. L. Rule 12. The defendant was convicted in the penalty of 10*l.* for using greyhounds, for the purpose of killing a hare, not having taken out a certificate. Immediately upon his conviction, he entered into the recognizance required by the act, to prosecute his appeal against it. At the next sessions, he accordingly entered his appeal, and it was respited by the Court. At the following sessions he again appeared for the purpose of trying the appeal, but it being objected, that there had not been eight days' notice given to the convicting magistrate, as was required by the rule of the sessions, the magistrates dismissed the appeal, and confirmed the conviction. On moving for the rule nisi, the case of *Rex v. Justices of Leeds (a)* was relied on, and it was contended, that the entering into the recognizance before the magistrate, dispensed with the necessity of giving the usual notice to him of trying the appeal.

W. E. Taunton shewed cause. The sessions have done right in dismissing this appeal. There was an appeal respited from the *January* to the *Easter* sessions. It was therefore incumbent on the appellant to comply with the rule of the sessions, and give the requisite notices. But none were given. In *Rex v. Justices of*

(a) 4 T. R. 583.

Leeds,

Leeds, the question arose on the 17 G. 3. c. 56., by which the convicting magistrate is directed to inform the party of the mode of giving notice required by that act; that not having been done it was held that the party was excused for not having complied with the act, by giving a notice in writing. But then there had been a sufficient notice, not in writing, with which the convicting magistrates expressed themselves satisfied. It is said, that the sessions ought in this case to have adjourned instead of dismissing this appeal; but it is clear, that they might do either. *Anonymous* (a), and in *Rex v. Justices of Buckinghamshire* (b), *Lawrence J.* expressly determined that case on the ground of the special directions in 9 G. 1. c. 7. s. 8.

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against
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Comyn contra. The appellant has in this case complied with the directions of the act of parliament; for the 13th section of the act expressly gives the party aggrieved a right of appeal on giving security to the amount of double the penalty. Here that security was given for the appellant. In *Rex v. Justices of Leeds*, the recognizance was held to supply the want of a notice, and here the security ought to have the same effect.

ABBOTT C. J. It was, perhaps, sufficient for the party to entitle himself to enter his appeal at the *January* sessions, that he had given the security required by the act, although no notice of appeal had been given by him; but when once he had entered his appeal, he was bound to conform to the practice of the

(a) *Str.* 515.(b) 5 *East*, 345.

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The KING
against
The Justices of
SALOP.

sessions. It was therefore necessary for him to have given the usual notice of trying his respited appeal at the *Easter* sessions, and not having done so, the magistrates were authorized to dismiss the appeal altogether.

Rule discharged with costs.

Tuesday,
June 15th.

WINDLE *against* ANDREWS.

To entitle the indorsee of an inland bill of exchange to recover interest from the drawer, it is not necessary to protest the same for non-payment.

ACTION by the indorsee against the drawer of an inland bill of exchange, the acceptor not having paid the bill when due. Plea, non-assumpsit. The cause was tried before *Abbott* C. J., at the sittings after *Michaelmas* term, 1818, when the plaintiff entitled himself to a verdict for the principal: he did not, however, prove any protest. It was objected that by the 3 & 4 *Anne*, c. 9. s. 5., the drawer of an inland bill was not liable for interest, unless the bill had been protested. The Lord Chief Justice over-ruled the objection, and the plaintiff had a verdict for principal and interest. *Puller*, in *Hilary* term last, obtained a rule nisi to reduce the damages, by deducting the amount of the interest included in the verdict. Against which rule

Gurney and *Comyn* now shewed cause. It has not been the practice to protest an inland bill of exchange, either in case of non-acceptance or non-payment. The 5th section of the statute of *Anne* (upon which the objection arises) enacts, that "no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless the same be underwritten or indorsed thereupon." Although those words are very strong; yet Lord *Hardwicke*,

wicke, in *Lumley v. Palmer* (a), held a parol acceptance to be good, and that decision was afterwards confirmed by the Court of King's Bench. It is sufficient here to give notice to the drawer of non-payment or non-acceptance, without making any protest; for the words are, "If such bill be not accepted by such underwriting, &c., no drawer shall be liable to pay costs, damages, and interest, unless such protest be made, and within fourteen days after such protest the same be sent, or otherwise notice be given to the party from whom such bill was received." Now, by the latter words, notice to the drawer will be a compliance with the statute, and all the purposes of the act will be thereby answered. In *Walker v. Barnes* (b), it was held that the drawer of a bill was not liable to pay interest for the time which elapses between the day when the bill becomes due and the day when he receives notice of the dishonour. In that case, it was admitted in argument, and conceded by the Court, that from the time the drawer did receive notice of the dishonour he was liable for interest, although no protest, in that case, had been made: that therefore is an authority in point with the present. They also cited *Robins v. Gibson*. (c)

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Puller, contra. The 4th section of the act recites the 9th and 10th W.3. c. 17., which directed, that after acceptance of inland bills, the payee of the bills, or his assigns, may and shall cause the same to be protested; and then recites that it had omitted to provide for the case of the non-acceptance of bills, and enacts, that in such case the holder, or his assigns, may and shall

(a) 2 Str. 1000. (b) 5 Taunt. 240. (c) 1 M. & S. 288.

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cause the same to be protested; and by the 5th section it is expressly provided, that if the bill be not accepted by writing, no drawer of any such inland bill shall be liable to pay costs, damages, or interest thereupon, unless such protest be made for non-acceptance thereof, and within fourteen days after such protest the same be sent, or otherwise notice thereof be given to the party from whom such bill was received. Now, the notice there referred to must be notice of the protest. The act then goes on to provide for the case of a bill accepted, but not paid when due; and enacts, that no drawer of such bill shall be compellable to pay any interest, &c. thereupon, unless a protest be made and sent, or *notice thereof* (i. e. or notice of the protest) be given in manner and form above mentioned; and the latter part of the section is decisive, for it goes on to say, "Nevertheless, every drawer of such bill shall be liable to make payment of interest, &c., upon such inland bill, if any protest be made of non-acceptance or non-payment thereof, *and* notice thereof be sent, given, or left, as aforesaid." It is clear, from the words of this section, that to entitle the holder to recover costs or interest, the bill must be protested for non-acceptance or non-payment. In *Harris v. Benson* (a), which was an action against the drawer of an inland bill after acceptance, it was ruled, that for want of a protest, according to the 2 & 10 W. 3. c. 17., the drawer could not be charged with interest. The statute of *Anne* was passed to provide for a case omitted by the statute of *William*, i. e. a case of non-acceptance, and is, in every other respect, in *pari materia* with the former statute. The opinion that prevailed soon after the passing of the act certainly

(a) 2 Str. 910.

was,

was, that a protest was necessary to entitle the holder to recover interest; and if a contrary opinion has since prevailed, it must have arisen from not adverting to the language of the act of parliament.

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ABBOTT C. J. If this question had been now agitated for the first time, I should have thought that there was great weight in the argument which has been addressed to the Court on the part of the defendant; but it appears to me to have been settled by the practice of above half a century. In *Harris v. Benson*, which arose in the 5th G. 2., it was held that the drawer of an inland bill of exchange was not chargeable with interest for want of a protest; and about two years subsequent to that decision, the Lord Chief Justice of the Common Pleas held, in the case of *Rea v. Meggott (a)*, that a parol acceptance of an inland bill was not binding: both these points depend upon the same clause in the statute 3 & 4 Anne, c. 9. Lord Hardwicke, however, shortly afterward, in the case of *Lumley v. Palmer*, over-ruled the latter of these decisions, and the Court of King's Bench, upon argument, supported him in that opinion; to which opinion the Lord Chief Justice of the Common Pleas afterwards acceded. From that time to the present, *Lumley v. Palmer* has been considered to be, and has been acted upon, as law. No question has since arisen on the other part of the clause relating to interest, till the late case in the Court of Common Pleas, which does not, in its circumstances, apply to the present. The practice, however, has been uniform; and I think we are bound by the decision of *Lumley v. Palmer*, and

(a) Cited in *Cas. temp. Hardw.* 77.

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against
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that this case, which arises on the same section of the act, must be governed by the principle there established. This rule, therefore, must be discharged.

BAYLEY J. The words of the statute are in favor of the argument for the plaintiff, but the invariable practice is to the contrary. There is no instance of a protest on an inland bill of exchange being given in evidence, and yet it is every day's practice to allow interest. Now that cannot have been done through ignorance of the law, but must have proceeded on the construction of this act of parliament. I think that the uniform practice is right. Before the 9th and 10th *W. 3. c. 17.* no protest was ever made on an inland bill of exchange. By that statute the parties were only entitled to make one in the case of an accepted bill; and the 3d and 4th *Anne* extended that power to the case of a refusal to accept, and then enacted that no acceptance should be sufficient to charge any person, unless in writing, and that the party should not be liable, if the bill be accepted and not paid, to pay any costs, damages, or interest thereupon, unless a protest be made. Now that act gave the holder of the bill a remedy he did not possess before; and by the eighth section it was provided that nothing therein contained should extend to discharge any existing remedy against the drawer, acceptor, or indorser of the bill. Subsequently to this act, *Harris v. Benson* was decided upon the question of allowance of interest; and *Rea v. Meggott*, in the 7 *G. 2.*, upon the parol acceptance; both of which cases were founded upon the literal construction now sought to be given to the 5th section.

The

The latter of these cases was expressly over-ruled by Lord *Hardwicke* in *Lumley v. Palmer*, and from that time to the present the other question has never been raised; but the practice which previously prevailed of not allowing interest in such cases has been changed. I think, therefore, that by the latter cases the decision in *Harris v. Benson* was virtually over-ruled. The principle is this: the 8th section provides that the act shall not take away any remedy which the party had before. Now before that act, by the common law the defendant was liable for interest. Although, therefore, unless in compliance with the 3 & 4 *Anne*, the bill was protested, he is not entitled to any remedy under that statute, still the 8th section preserved to him his remedy at the common law, although no protest be made.

HOLROYD J. I am of the same opinion. The decision of Lord *Hardwicke* in *Lumley v. Palmer*, together with the uniform practice, appears to me sufficient to determine this question. That case was decided after a contrary determination at nisi prius; and the Lord Chief Justice of the Common Pleas, who made that determination, is said to have acceded to the decision. I think, therefore, it would be binding upon us, even if we did not clearly see the principle upon which it proceeded. But I fully concur with my Brother *Bayley*, in the explanation which he has given of the principle upon which that case was determined.

BEST J. It would introduce great inconvenience and uncertainty into mercantile transactions if we were to decide in favour of the defendant. The ob-
ject

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ject of the proviso in the 3 & 4 *Anne* was clearly this; to prevent the holder of a bill from losing any remedy which he had previously to the passing of that act. Now previously to the passing of that act he was entitled to interest, although no protest were made.

Rule discharged.

Wednesday,
June 16th.

DEVEREUX and Another *against* BARCLAY and Another.

Trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery has occurred by mistake only.

TROVER for oil, plea not guilty. At the trial at the adjourned sittings before last *Hilary* term at *Guildhall*, before *Abbott C. J.*, the plaintiffs proved a purchase of four tuns of sperm. oil, then lying at the defendants' warehouses, from a person of the name of *Collinson*. The following delivery order was given, dated 13th *February*, 1818: — "To Messrs. *A. and W. Barclay*, *Leicester Square*. Please to deliver to the order of Messrs. *Devereux* and *Lambert*, the under-mentioned goods (enumerating them). Charges from 27th *February*, to be paid by Messrs. *Devereux* and Co.

Edward Collinson."

Soon after this transaction, *Collinson*, who had in the mean time purchased from Mr. *Gamon*, a broker, without the defendants' knowledge, some dark sperm. oil of inferior value, then also lying at the defendants' warehouse, sold this latter quantity, about three tuns, to a third person, and gave the following delivery order, dated 3d *March*, 1818: — "To Messrs. *A. and H. Barclay*. Please to deliver to Mr. *Dale's* carts my dark sperm.

sperm. oil." The defendants, not being aware that the two parcels of oil both belonged to *Collinson*, by mistake, delivered the first parcel of oil to the second delivery order, the first delivery order not having been at that time presented to them by the plaintiffs. The plaintiffs, on the 28th *March*, presented their delivery order, and demanded the oil. *Abbott C. J.* being of opinion that this mis-delivery, by mistake, did not amount to a conversion, so as to entitle the plaintiffs to maintain trover, directed a nonsuit. A rule nisi for a new trial having been obtained,

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DEVCREUX
against
BARCLAY.

Scarlett and *Manning* now shewed cause. The mistake which has occurred is solely imputable to the negligence of the plaintiffs, in not sooner sending their delivery order to the defendants. The conversion must be an injurious act. A mere mis-delivery by mistake will not do. That was so considered by *Buller J.* in *Syeds v. Hay*. (a) The case of a warehouseman and a carrier stand on the same ground. Now for a mis-delivery by a carrier, trover will not lie, although he may be liable for negligence. *Ross v. Johnson*. (b) *Townsend v. Inglis*. (c) Here, too, the property, even supposing a conversion, was not changed, as between *Barclay* and *Devcreux*, at the time of the conversion, for although by the sale it was changed as between *Devereux* and *Collinson*, yet, till the defendants were made acquainted with that sale, the goods, as far as they were concerned, remained the property of *Collinson*.

Gurney and *Jones*, contra, were stopped by the Court.

(a) 4 T. R. 264.

(b) 5 Burr. 2827.

(c) Holt. N. P. 278.

ABBOTT

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DEVEREUX
against
BARCLAY.

ABBOTT C. J. What effect the production of further evidence may have, the Court cannot anticipate at present; it is quite sufficient to say that this cause having been stopped too soon, the plaintiffs are entitled to a new trial. This is not the case of an innocent delivery, for it is one contrary to the knowledge which, in point of law, the defendants ought to have had. There is a great distinction between an omission and an act done. In the case cited from *Burrow* no act was done, and Lord *Mansfield* expressly said that it was a mere omission. But here there is an act done by the defendants, which, in its consequences, is injurious to the plaintiff. Upon this evidence, therefore, I am now of opinion, that trover may be maintained.

BAYLEY J. The case of *Youl v. Harbottle(a)* shews that a carrier is liable in trover for a mis-delivery.

HOLROYD and BEST J. concurred.

Rule absolute.

(a) *Peake, N. P. C. 49.*

Wednesday,
June 16th.

PINKERTON against CASLON and Another.

CASLON and Another against PINKERTON.

Where it was stipulated that in case of the breach of an agreement the sum of 100*l.* should be received as a stipulated debt

binding on each party, as to the amount; and an action for damages generally, for the breach of this agreement, was referred to an arbitrator, who awarded only 10*l.* damages. Held, that in order to entitle the party to come to set aside this award, it was necessary expressly to state in the affidavit, that this clause was pointed out to the arbitrator at the time, and that he was required to act upon it.

THESE two actions were referred to arbitration. The former was brought to recover a compensation for work and labour and materials found in erecting a gasometer and other works near *Burton Crescent*. The

agreement

agreement under which the work had been done, contained the following clause: — “ And the said *James Pinkerton* and *James Pausey* (his surety) do hereby jointly and severally promise and agree that in case *James Pinkerton* shall fail to perform his part of the agreement, they will pay to the said *William Caslon* and *William Symmons* the full sum of 100*l.*; to be paid, or in case of non-payment, to be recovered and levied as a stipulated debt binding on each party as to the amount, and not as a penalty, or in the nature of a penalty.” The latter action was brought by *Caslon* and *Symmons* against *Pinkerton* generally for damages for the breach of this agreement. The arbitrator made his award, finding that 140*l.* was due to *Pinkerton* for his work and labour, &c., and that *Caslon* and *Symmons* had sustained 10*l.* damages for the breach of the agreement by *Pinkerton*, and awarded that they should pay 130*l.*, being the balance due to *Pinkerton*. A rule nisi having been obtained to set aside this award, on the ground that the arbitrator ought to have awarded 100*l.* damages in the latter action,

1819.

 PINKERTON
against
CASLON.

Scarlett shewed cause. The action by *Caslon* against *Pinkerton* is for damages generally. If it had been founded on the agreement, the sum of 100*l.* would have been claimed as a specific debt. There could be no reason for referring the case to an arbitrator if he was bound to find 100*l.* damages without any discretion to be exercised on his part. The party had an option either to go for 100*l.* or for damages generally, and he has chosen the latter alternative. Besides it does not appear from the affidavits, that the attention of the arbitrator was expressly called to this clause of the agreement,

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—
PINKERTON
against
CASTON.

ment, or that any claim was made for the 100%. stipulated debt.

Gaselee and Stephen, contra. Although the affidavits do not expressly raise that point, yet no reasonable doubts can be entertained that it was submitted to the arbitrator. Here it is clear that the parties themselves chose to assess their own damages in case the agreement was broken; and the moment the arbitrator found that a breach had been committed, he was bound to have awarded 100%. as the stipulated damages.

ABBOTT C. J. The words of the agreement are not stipulated damages but stipulated debt, and it does not appear that any distinct claim was made before the arbitrator for the 100%, nor that this clause in the agreement was at all submitted to his consideration. All that does appear is, that the case went before him on an order of reference, stating that an action for damages for the breach of the agreement had been brought, and was then depending. The party seems to me to have taken his chance of getting more damages than 100%, and having failed, now comes to the Court to ask that this award may be set aside on a point which was never submitted to the arbitrator. This clause in the agreement is an attempt to evade the provisions of a most beneficial act of parliament, and may produce great injustice. For what can be more unconscientious, than that a party, who is only damnified to the extent of 5%, should, notwithstanding that fact, recover the sum of 100%? Under these circumstances, I am of opinion, that the party who seeks to set aside this award ought at least to have distinctly pointed out

out the clause in the agreement to the arbitrator, and expressly required him to act upon it; and this not being stated in the affidavit to have been done, the rule must be discharged with costs.

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—
PINKERTON
against
CASLON.

Rule discharged with costs.

The KING *against* PLAYER.

Wednesday,
June 16th.

W. E. TAUNTON had obtained a rule nisi for a quowarranto, calling upon the defendant to shew by what authority he exercised the office of a freeman of the city of *Gloucester*. It was stated by the affidavits, in support of the rule, that the defendant had, at a meeting of the common council of the city of *Gloucester*, been nominated an honorary freeman of that city; and that the question put upon that occasion was this, as appeared from the corporation book, "Whether the several persons hereafter named shall be admitted to the freedom of this city?" The defendant, together with seventy-nine other persons, were then named in one body, and the question being put thereon, was carried. The objection was, that the question ought to have been put separately on each individual; and in support of it, *Rex v. Munday (a)* was cited. The affidavits in answer stated, that the corporation had always exercised the right of appointing honorary freemen, and that the charter was wholly silent as to the mode of admitting them; and they further stated, that the mayor and deputy town-clerk, upon this occasion, read over the list

Where at a corporation meeting, for the purpose of electing honorary freemen, a list of names was proposed, upon the whole of whom the vote was taken collectively, instead of individually; held that such election was void, even where the corporation consisted of an indefinite number.

(a) *Cowp.* 530.

1819.

The KING
against
PLAYER.

of names twice to the persons assembled at the meeting, and asked whether any one of the members of the council had any objection to the persons so proposed, or either of them; and no objection being made, the votes were taken, and the several persons unanimously elected; and they added that if any objection had been made by any individual, the name objected to would, according to the practice of the corporation, have been immediately withdrawn. The number of freemen was sworn to be indefinite.

Scarlett and Carter shewed cause. The case of *Rex v. Munday* is distinguishable on two grounds: first, that the body, in that case, consisted of a definite number; and, secondly, that the list of names was not carried unanimously. But here the body is indefinite; and it is expressly sworn, that if any one of the council had made any objection to any of the names proposed, it would have been instantly withdrawn. The mode of election, therefore, is substantially the same as if the question had been put separately upon each freeman; for the question put was, "Whether any one of the council had any objection to them, or either of them?" The principle upon which these elections have been held bad is this, that by putting up a list of names, the individuals of the corporation have not an opportunity of fairly judging of the merits of each freeman; but the special circumstances stated in the affidavits take this case out of that rule.

Per Curiam. This mode of electing freemen by putting up a list of names, upon the whole of which the members of the corporation are called upon to give one
vote,

vote, is calculated to produce, not a real, but an apparent unanimity only; for each individual will compromise his own opinion, in order to induce others to do the same. The case in *Cowper* is said to have been a case of a definite body; but that affords no solid ground of distinction. The principle upon which the Court decided that case must govern the present, and the rule therefore must be absolute.

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—
The King
against
PLAYER.

Rule absolute.

GADD *against* BENNETT.

Wednesday,
June 16th.

RULE for judgment, as in case of a nonsuit. The venue being in *London*, the cause had been set down for the sittings in term, and made a remanet to the sittings after term, by consent, when the plaintiff withdrew the record.

Where a cause was set down for the sittings in term, and made a remanet to the sittings after term by consent, the defendant may move for judgment, as in case of a nonsuit, if the plaintiff afterwards withdraws the record.

Reader, for the plaintiff, insisted that the cause having been once carried down to trial by the plaintiff, he had complied with the terms of the 14 G. 2. c. 17., so that the defendant could not move for judgment, as in case of a nonsuit, and must proceed to trial by proviso. *King v. Peppett*, 1 T. R. 492. *Mewburn v. Langley*, 3 T. R. 1. *Porzelius v. Maddocks*, 1 H. Bl. 107.

Per Curiam. In those cases, the cause had been made a remanet at the assizes. At the sittings in *Lon-*

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—
GADD
against
BENNETT.

don and *Westminster*, the cause being made a remanet, does not prevent the defendant from moving for judgment, as in case of a nonsuit.

Campbell, for defendant.

Rule discharged on peremptory undertaking.

Thursday,
June 17th.

DOE, on the demise of BURDETT, *against*
WRIGHT.

A term of 1000 years was created by deed in 1717, and in 1735 was signed for the purpose of securing an annuity to A, and after that to attend the inheritance. A. having died in 1741, and the estate having

remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the mean time taken of the term except that in 1801 the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for: Held that under these circumstances the jury were warranted in an ejectment brought for the premises by the heir at law to presume a surrender of the term.

A testatrix, after charging her estate with the payment of an annuity, devised the same to G. S., his heirs and assigns, for ever; but her wish and desire was, that G. S., in his lifetime, should convey the estate to some charitable uses, the choice of which was left entirely to his discretion; and, subject to this, G. S. was to enjoy the estate to his own use for his life: Held that this was a devise void by 9 G. 2. c. 36., by which act, the estate given, and not merely the trust, was made void; and that the legal estate, upon the death of the devisee for life, descended on the heir at law. By the codicils to the will, certain legacies were bequeathed, charged upon the estate, and a power was given to G. S. (who was also named executor) to cut down timber to pay them, and interest was directed to be paid by him to the legatees, after the expiration of two years: Held, that the personal charges could not raise by implication the *express* estate for life given to G. S. by the will into an estate in fee.

manor,

manor, capital messuage, farm, lands, and hereditaments in *Fairstead* aforesaid, unto *Granville Sharp*, his heirs and assigns; to hold unto the said *Granville Sharp*, his heirs and assigns, for ever. *But my wish and desire is, that the said G. Sharp do, in his lifetime, by proper deeds, convey, settle, and assure the said manor, capital messuage, farm, lands, and hereditaments, to some charitable uses, (subject to the said annuity,) to take place at his decease, and not before. The particular uses to be limited I leave entirely to his discretion, having the fullest confidence, as well in his judgment of the choice of proper objects, as in his integrity in the disposal thereof, according to the wish by me expressed; but it is my intent and meaning, that the said G. Sharp shall enjoy the said estate, subject as aforesaid, to his own proper use and behoof, during his life."* By a codicil, dated 28^d February, 1787, reciting that there was a considerable quantity of timber on her estates at *Cranham* and *Fairstead*, in the county of *Essex*, which estates she had, by her will, devised to several persons therein named, she declared that it was her will, that the persons to whom she had respectively given the said estates, should take the same, subject to the payment of the legacies following; viz. her estate at *Cranham*, subject to the payment of 1000*l.* to the Marquis of *Bellegarde*, over and above all other legacies and bequests by her already given him; and her estate at *Fairstead*, subject to the payment of 1000*l.* to Count *Bethisy*, a relation of her late husband, residing in *France*; and she thereby charged her said estates respectively with the payment of the respective sums; but as the persons to whom she had respectively given the said estates might raise the said sums by sale of timber, without otherwise incumbering the said estates,

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to discharge the said legacies, she willed that the same should not be payable until the end of two years after her decease, and without interest during that time; and she appointed *G. Sharp* executor. By another codicil, dated 1st *September*, 1787, reciting, that by her will, dated 30th *May*, 1786, she had given to the Princess of *Ligne*, niece of her late husband, 500*l.*; and by the above written codicil, she had given to Count *Bethisy* 1000*l.*, she thereby revoked the said legacies of 500*l.* to the said Princess of *Ligne*, and said legacy of 1000*l.* to said Count *Bethisy*; and she thereby willed and directed, that the said respective legacies should not be paid, but she willed and directed that the sum of 1000*l.* should be charged upon and paid out of the estate at *Fairstead*, at such time and in such manner as she had above directed, concerning the 1000*l.* which she had given to the said Count *Bethisy*, unto the two youngest daughters of the Marquis of *Bellegarde*, in her said will and codicil named; and she willed, that after the end of two years after her decease, one moiety of the said 1000*l.* should be paid each of the youngest daughters of the said Marquis, as they should respectively attain the age of twenty-one years, or be married. If one died before twenty-one, the survivor to take the whole. Until such age or marriage, interest at 3 per cent. to commence at the end of two years after her decease, to be paid by *G. Sharp*, towards their maintenance and education, and their receipts to be sufficient discharges. *G. Sharp*, after having enjoyed the estate from the period of the death of the testatrix, in 1787, died on the 13th of *July*, 1813, without having made any disposition of the estate to any charitable uses. Upon his decease, the defendant came into possession, claiming as
heir

heir at law to Mrs. Oglethorpe. It was, however, clearly proved at the trial, that the lessor of the plaintiff was the true heir at law of Mrs. Oglethorpe. It appeared also, that by a deed, dated 28th November, 1717, certain terms of 1000 years were created for the purpose of securing a mortgage of 800*l.* upon the premises. Sir *Nathan Wright*, in 1727, having purchased the fee of the property, there was, in the deed conveying it to him, an express declaration, that *Elizabeth Palmer*, to whom the terms were assigned by the deed of 20th November, 1717, should stand possessed of the premises for the residue of the said term of 1000 years, subject to a redemption, on payment of 1400*l.* and interest, by Sir *Nathan Wright*. On the 16th of January, 1735, by a deed between *Elizabeth Wright*, (afterwards Mrs. Oglethorpe,) of the first part; *Oliver Martin* and *Thomas Russell*, executors and residuary legatees of *Elizabeth Palmer*, of the second part; *Alexander Prescott*, of the third part; and *Herbert Tryste*, and dame *Abigail*, his wife, (widow of Sir *N. Wright*, and mother of Mrs. Oglethorpe,) of the fourth part; after reciting the creation of the terms, their assignment, and the declaration before mentioned in the deed of 1727, the executors, *Martin* and *Russell*, at the request of *Tryste* and his wife, assigned, and *Elizabeth Wright* ratified and confirmed, the premises to Mr. *Alexander Prescott*, for the residue of the term of 1000 years, in trust for securing an annuity of 45*l.* to *Tryste* and his wife, and after that to attend and wait upon the freehold and inheritance, as they were conveyed by the deed of 1727. A deed was also produced, dated 26th August, 1801, between G.

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Sharp, of the one part, and *Joseph Holden Strutt*, Esquire, of the other part, by which, part of the *Fairstead* estate was conveyed, having been sold for the redemption of the land-tax. The schedule of this deed contained an enumeration of the two deeds of 1717 and 1735, and stated that they were then both in the possession of *G. Sharp*. Two points were made at the trial: First, that under the will of *Mrs. Oglethorpe*, *G. Sharp* took an estate in fee; and, secondly, that the outstanding terms created by the deed of 1717, and assigned by that of 1735, to attend the inheritance, being still in existence, the lessor of the plaintiff could not recover, not having the legal estate. The learned Judge reserved the first point, and as to the second, he stated to the jury, first, that the great object of the assignment of these terms, was to secure an annuity of 45*l.* to two persons who were long ago dead, and that that part of the trust was satisfied; and, secondly, that as to attending the inheritance, which was another object, the circumstance that the deeds were not found in the hands of the trustees, but in those of the devisee of *Mrs. Oglethorpe*, who had been seised in fee of the estate, and had died upwards of 30 years ago, at the age of 79, and from whom the devisee must have derived possession of them, together with the fact that the beneficial occupation of the estate had continued during all that period unfettered by any such clog, were sufficient to warrant them in presuming that those terms had been surrendered, and a re-conveyance of the legal estate made to the person beneficially interested. The jury accordingly found a verdict for the plaintiff. *Marryat* having, in last *Easter* term, obtained a rule nisi for a nonsuit on the first point, which was reserved,

reserved, or for a new trial, on the ground of the mis-
direction of the learned Judge on the second point,
cause was now shewn against that rule, by

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Onslow Serjt., *Curwood*, and *Chitty*. Under the circumstances of this case it was competent for the jury to presume a surrender of these terms. In *Doe dem Graham v. Scott* (a), the reasons given are in favour of a surrender in such a case as this. The decision there was against presuming a surrender; but that was because such a presumption could not be made against the owner of the inheritance: here, however, it is in his favour that it is made, which brings the case within the principle laid down by Lord *Mansfield* in *Lade v. Holford*. (b) *Goodtitle, dem. Jones, v. Jones* (c), and *England, dem. Syburn, v. Slade* (d), are authorities to the same effect. Then if so, the possession of the deeds by Mrs. *Oglethorpe* and her devisee for so long a period tends strongly to shew that the jury were well warranted in making such a presumption. For she could have no interest in keeping up the term during all this period; and *G. Sharp*, in the deed of 1807, does not speak of the terms as still subsisting, but only that the deeds of 1717 and 1735 are in his possession. As to the second point, it is clear *G. Sharp* took only an estate for life; for by the will the fee is only devised to him upon a trust which is contrary to law. It is said indeed that the words of the will are not imperative on him, and that the objects were not sufficiently distinct. But in *Harding v. Glynn* (e), the testator devised to his wife, but did “desire her to give at or before her death, the house, &c.

(a) 11 *East*, 478.(b) *Bull. N. P.* 110.(c) 7 *T. R.* 43.(d) 4 *T. R.* 682.(e) 1 *Atk.* 469.

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unto and amongst such of his own relations as she should think most deserving and approve of," and it was held that these words created a trust. *Pierson v. Garnett* (a), *Massey v. Sherman* (b), and *Morice v. Bishop of Durham* (c), are also authorities to shew that these words are sufficient to create a trust in *G. Sharp*. If so, he must be considered as a trustee to convey this estate to some charitable uses. Now that is contrary to the 9 G. 2. c. 36. s. 1.; and the third section of that statute does not merely avoid the trust, but also the estate. That appears to be established by the cases of *Adlington v. Cann* (d), and *Carrick v. Errington*. (e) If so, *G. Sharp* cannot be considered as taking an estate in fee with a resulting trust to the heir at law, but must be considered as taking only an estate for life, and then the fee, being undisposed of by the will, descends to the heir at law who is entitled to the legal estate. But it is said that independently of the will the estate in fee is given by the codicils to *G. Sharp*. For he is thereby charged with the payment of interest on the legacies, and so unless he took a fee he might have received hereditatem damnosam. The testatrix gives a power to raise the money by cutting down timber, and expressly directs, that till the end of the two years no interest shall be paid, and that the legacies shall be charged on the estate, and then at the end of that period, when *G. Sharp* should, by the sale of timber, have got a fund into his possession, she directs interest to be paid. It is clear, therefore, that it was not the intention of the testatrix to charge him personally.

(a) 2 Bro. Ch. Ca. 38. & 226.

(b) Ambler, 520.

(c) 9 Ves. 399. 10 Ves. 522. S. C.

(d) 5 Atk. 141.

(e) 2 P. Wms. 361.

But

But supposing that to be so, still no case can be cited, where, after a clear devise of an estate for life a charge of this sort has ever been held to enlarge it into an estate in fee. All the cases are where the testator's intention being ambiguous, the Courts have decided, from this circumstance, that his intention was to give a fee. Here the devise to *G. Sharp* is by the will in terms a beneficial estate for life only, and therefore it cannot, by construction of the words of the codicil, be enlarged into a beneficial estate in fee. The lessor of the plaintiff, then, being heir at law, is entitled to the fee which was left undisposed of by *Mrs. Oglethorpe's* will.

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Marryatt, Gurney, Sugden, and Kelly, contra. Admitting that it is competent to presume a surrender of a term in favour of the owner of the inheritance, there are no circumstances from which such surrender can fairly be presumed here. For as to the circumstance relied upon, of the deeds being in the possession of the owner of the inheritance, and not of the trustee, that occurs in many cases where nevertheless the term is still subsisting; and the beneficial enjoyment of the estate is equally consistent with it, for the object of the term was to protect the inheritance, and enable the parties to enjoy the estate without molestation. Then, in answer to this presumption, there is the fact of the term being created in 1717 and dealt with in 1727, of the assignment in 1735, and the deed of *G. Sharp*, alluding to it, in 1801. The learned Judge was therefore not warranted in his direction to the jury on this point. Then, as to the second point, *G. Sharp*, under this will and codicils, took an estate in fee. By the will it is given to him, his heirs, and assigns, to hold unto him, his heirs, and

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and assigns for ever. The testatrix then adds that her wish and desire is, that he should convey it to some charitable uses, leaving the choice entirely to his discretion, and concludes by stating that her intent and meaning is that he shall enjoy the estate for his own benefit during his life. Now supposing that this is a trust for charitable uses, and that it is within 9 G. 2. c. 36., still it does not follow that the estate in fee is void by the statute. And if the trust be only void, then *G. Sharp's* heir will be entitled to the legal estate, with a resulting trust for the benefit of the heir at law of Mrs. *Oglethorpe*. If so, the legal estate is not in the lessor of the plaintiff, and this ejectment must fail. This cannot, however, be properly considered as a case within the statute, for no class of objects are mentioned or even contemplated by the testatrix: she gives an unlimited discretion; the trust is therefore a trust for nobody. But supposing it to be a trust, then, inasmuch as some charitable uses are excepted out of the statute, the Court ought to presume that the charitable uses contemplated were those to which the devise might legally be applied. In that case also *G. Sharp* would take an estate in fee. Then the codicils, independently of the will, give an estate in fee to him; for he is thereby charged personally with the payment of the interest on the legacies there given. And a charge of that description has in a variety of cases been held ex necessitate to enlarge an estate for life into an estate in fee. The timber might be insufficient, and it might become necessary for the devisee to mortgage the estate for the purpose of raising money to pay the legacies, *Bailey v. Ekins* (a), *Wright v. Pearson* (b), *Stanley v. Stanley* (c),

(a) 7 Ves. jun. 319. (b) *Ambler*, 358., and 1 *Eden's Cases*, 119. S. C.
(c) 16 Ves. 491.

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Doe, dem. *Tompkins*, v. *Willan* (a), *Doe*, dem. *Toone*, v. *Copestake* (b), *Evans* v. *Bicknell* (c), and *Jenkins* v. *Jenkins* (d), were cited in the course of the argument.

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BAYLEY J. This case has been argued at great length, and if we entertained any doubt upon the subject, we would postpone our judgment. But as my Lord Chief Justice and my Brother *Best*, before they left the court, heard a great part of the argument, and have communicated to us their impressions on the subject, we do not think it necessary, having no doubt ourselves, to delay giving our opinion. The first question is, whether the learned Judge was wrong in directing the jury to presume the surrender of the outstanding terms. I think, that, in this case, even if he had used the strongest terms of recommendation and advice, he would have been right. The facts are these: the terms were created by indentures dated *October* 1st, 1717. In 1735, they were assigned for the purpose, first, of securing the payment of an annuity to the father and mother of Mrs. *Oglethorpe*, and after their death, to attend the inheritance. Mrs. *Oglethorpe's* mother, the survivor, died in 1741, and she herself made her will in 1786. Now I cannot see any sufficient reason for continuing the terms during all that period; for from the time of the death of the annuitants the object ceased; and, in point of fact, from 1741 till the present time, with one exception only, nothing is even heard of them. The principle upon which the courts proceed in these cases is that they

(a) *Ante*, 84.(b) 6 *East*, 328.(c) 6 *Ves. jun.* 184.(d) *Willes*, 652.

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will presume a surrender, where it is for the interest of the owner of the inheritance that the terms should be considered as surrendered; and where an estate has continued for so long a period in the same hands, there seems no beneficial purpose which can be answered by the continuance of the terms. If, for instance, in 1786, these terms had been considered as subsisting, it would have been necessary for *Mrs. Oglethorpe* to have made enquiry, and to have found out the personal representative of *Prescott*, the trustee, after a lapse of fifty-one years, and perhaps at the expence of a limited administration. I, therefore, can see no benefit, but, on the contrary, a great inconvenience to the owner of the inheritance, from keeping the terms alive. It is true, that in 1802 *G. Sharp* covenants for the production of the deed of 1735: he does not, however, assign the terms, but only says, "I find this deed in my possession, and I covenant to produce it." He treats the terms, therefore, as subsisting in parchment, but says nothing as to whether they are then subsisting in interest or not. The case of *Doe v. Scott* is very different from this: there the term had been dealt with as subsisting, and it would, besides, have been prejudicial to the owner of the inheritance, if a surrender had been presumed. I think, therefore, that the learned Judge was quite right in his directions to the jury upon this point. Then, the terms of years being laid out of the question, we come to the merits of the case which turn upon *Mrs. Oglethorpe's* will. The argument is, that *G. Sharp* took an estate in fee under the will; and I agree, that but for 9 G. 2. c. 36., it would be so. But the effect of that statute is to strike out the devise in fee, and to reduce it to an estate for life only. For the

the fee is given, not for the purpose of enabling G. *Sharp* to pay the annuities, but for the purpose of his executing a trust, which the legislature say shall not be executed. The statute makes void not merely the trust but also the legal estate given; for if that were not so, a party might consider himself bound in honor, though not in law, to convey the estate to the uses prohibited. But it is said that the objects of this devise are not sufficiently definite to bring it within the statute. The words are, "I give and devise the said manor to G. *Sharp*, his heirs, and assigns, to hold to him, his heirs, and assigns, for ever; but my wish and desire is, that he do in his lifetime convey the said manor, &c. to some charitable uses (subject to the above annuity), to take place at his decease, and not before; the particular uses to be limited, I leave entirely to his discretion." The estate, therefore, is given with the words "wish and desire," and the authorities establish, that if you accompany the devise of an estate with words, that the devisee shall not enjoy it for his own benefit, but shall convey it over, it is imperative on him so to do. It is undoubtedly necessary, that the objects to which it is to be conveyed shall be definite; if, for instance, an estate be given to a man and his heirs, but the will of the donor is that the estate shall by him be devised to somebody, or to somebody named J. S., it will be void, as being too indefinite. But here the object is not so indefinite; for if this will had been made previously to the statute 9 G. 2. c. 36., the Court of Chancery would have executed it, and would have fixed on the particular uses to which the fund should be applied. Now the purposes for which the estate was given, is, that it should be conveyed to *some charitable uses*, and the operation

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another answer to that argument. *G. Sharp* might perhaps have expressed the gift to some of the charitable uses of the statute, and might have so done at law, still that as he has not done so, the law is not excluded. As to the charges in the different codicils, they give an estate in fee to *G. Sharp*. To my construction of it, (the effect being to strike out the devise in fee and to give an express devise of an estate for life,) I can find no case where, after such a devise, it has been held that a charge could extend the estate to an estate in fee. In all the cases where the words of the devise are such that there is not one, of which I am aware, an effect has been given to a proviso by an express devise of an estate for life. In the whole, my opinion is, that the direction of the Judge was right, that *G. Sharp* take the land for life, and that the lessor of the plaintiff recover.

think that the learned Judge was justified in the observations which he made to the jury; for there were strong grounds upon which such presumption might be made, and more particularly, as it was clearly for the interest of the owner of the inheritance that the term should be surrendered. That doctrine was laid down by Lord *Kenyon* in *Doe v. Staple*. (a) With respect to the point arising on the will, it seems to me, that the effect of the 9 G. 2. is to make the will as if it contained no bequest of the estate in fee to *G. Sharp*. But for that act, he would have taken an estate in fee ex neccessitate; for without it he could not have carried the trust into effect. The bequest is to him and his heirs, to hold to the use of him and his heirs, with a desire that he would convey to some charitable uses, and it then adds a bequest to him of an estate for life. Now supposing the case to fall within the 9 G. 2. c. 36., one question is, whether the whole devise is void, or the trust only. I think, that by the statute, the devise is void. For the third section makes void, all assurances of any lands, or of any estate therein, to or in trust for any charitable uses whatever. But supposing that only the trust is void, then it is a devise to *G. S.* in fee, in trust to his own use for life, with a resulting use to the heirs of the devisor, and that resulting use being executed by the statute of uses, the lessor of the plaintiff is still entitled to the legal estate. The will does not give power to *G. Sharp* to determine whether the estate shall be limited to a charitable use or not, but is imperative upon him to give it to some charitable use; and a devise to any such use is void by the statute. If it was intended to confine the ob-

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(a) 2 T. R. 696.

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jects to the exception in the act, the will should have confined it to the excepted charities. As to the codicils, I am of opinion that they are not sufficient to raise, by implication, the express estate for life given by the will, into an estate in fee. Upon the whole, I entirely agree with my Brother *Bayley* in the judgment which he has delivered, and think that this rule should be discharged.

Rule discharged.

Friday,
June 18th.

DOE, on the demise of HANLEY, *against*
WOOD.

The owner of the fee granted to A., his partners, fellow-adventurers, &c. free liberty to dig for tin and all other metals, throughout certain lands there-

in described, and to raise, make merchantable, and dispose of the same to their own use; and to make adits, &c. necessary for the exercise of that liberty, together with the use of all waters and water-courses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, and to convey any water-course over the premises granted, habendum for twenty-one years; covenant by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c., and to work effectually the mines during the term; and then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor: Held that this deed did not amount to a lease, but contained a mere license to dig and search for minerals, and that the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee.

The grantee commenced working the mines, but after some time discontinued, not being prevented by the want of water, or any other inevitable accident. The grantor, after some lapse of time, verbally authorized other persons to dig for ore throughout part of the land described in the deed, and met those persons on part of the land, and pointed out the boundaries within which they were to exercise the liberty; and himself subsequently entered into a mining adventure with other persons, which was carried on within the limits described in the indenture; and afterwards, in consideration of the surrender of the first grant, and of certain payments, demised the premises to a lessee for twenty-one years; and upon the execution of this lease, the original deed was delivered up, but there was no surrender in writing: Held that these acts amounted to a re-entry by the grantor, inasmuch, as unless referred to the exercise of that right, they would be acts of trespass by him.

Held also, that by 55 G. 3. c 184. s. 49., the commissioners of stamps are authorized to stamp letters of administration de bonis non, on security given, and without payment of the duty, as well in cases where the duty has been paid on the original letters of administration, as when such letters of administration have been originally stamped on credit.

and

and authority to dig, work, mine, and search for tin, tin ore, &c., and all other metals and minerals whatsoever, throughout all that part of the lands of the said *Thomas Carlyon*, commonly called *Crinnis*, therein limited and described; and the tin, tin ore, &c., and other metals and minerals there found, to raise, and bring to grass, and there to stamp, spall, pick, dress, cleanse, and make merchantable, and dispose of, to their own use, at their pleasure, subject to certain reservations; and within the limits of the set thereby granted to dig, and make such adits, shafts, &c., and to erect such sheds, engines, and other buildings, as they should from time to time think necessary or convenient, for the more effectual exercise of the liberties thereby granted, together with the use of all such water and watercourses arising or running within the limits of the set thereby granted, as were not in grant to any other person at that time, (except the pot-water belonging or running to the tenements of *Crinnis* and *Merthen*,) with liberty to divert and turn such waters and watercourses, except as aforesaid, and to cut any channels for conveying the same over any part of the lands lying within the limits of the set, for the purpose of more effectually and beneficially exercising and enjoying the liberties thereby granted; except unto the said *Thomas Carlyon*, his heirs and assigns, and his and their workmen, &c., free liberty of driving any new adit from any adit driven, or thereafter to be driven, within the lands thereby granted, and of quietly entering into and driving such new adits through the same, or any part thereof, and of sinking any shaft therein necessary and proper for the driving of such adit, into any other lands of the said *T. Carlyon*, or into the lands

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of any other person, at his and their pleasure; and also except unto the said *T. Carlyon*, his heirs and assigns, full liberty to convey any watercourse over the premises granted, or any part thereof, in such manner as he or they respectively should think meet for any purpose whatsoever, doing no injury to the workings of *J. A. H.* his partners, &c.; to have, hold, use, exercise, and enjoy the said several liberties, licences, &c. for the term of twenty-one years, fully to be complete and ended. The indenture contained covenants for the payment of an eighth share of all ore to *T. Carlyon*, and that *J. A. H.* and his partners would pay all rates and taxes, and would effectually work the premises, and support the adits, &c., and then contained a proviso, that in case of the neglect or failure in the performance of any of the covenants, it should be lawful for *Thomas Carlyon*, his heirs or assigns, upon the lands, or any part thereof, in the name of the whole to enter, and the same to have again, repossess, and enjoy. The special verdict then stated, that the surface of the lands was, during all the time, occupied by the said *T. Carlyon*, and his tenants of the surface, and that the said *J. A. H.*, soon after the execution of the indenture, dug for tin, &c., and that about the month of *July*, 1806, the said *J. A. H.* made an excavation or adit within the limits horizontally into the earth, from the sea shore, upon the level of the sea, about seven or eight fathoms, when it cut a vein, containing a small quantity of copper ore, and that the said *J. A. H.* then worked on the course of this vein towards the west, and got a small quantity of copper, but none of the copper was sold, and no profit was made, nor were any dues rendered to the said *T. Carlyon* in respect thereof; and

and that *J. A. H.* afterwards pointed out a spot within the limits where he intended to sink a shaft down to the adit, and four pins were sunk in the ground to mark out the spot, but no such shaft was ever made, nor any building erected, or other work done by *J. A. H.* within the limits aforesaid; and that *J. A. H.* did occasionally work within the limits, until about six weeks before he died; when declaring that it was not worth while to work, and that he would not work any more in any of the excavations or adits, he directed the materials to be removed, and that all the timber that was there should be knocked away and carried off. In pursuance of which direction, the timber was knocked away and entirely removed, excepting one piece of timber of very small value, which the men refused to knock away on account of the danger to themselves in doing so; and the sea filled up the entrance of the excavation or adit. It then stated the death of *J. A. H.* intestate, and the grant of letters of administration to *Nevel Norway*, one of his creditors, on which a stamp-duty had been paid, on the sum of 300*l.* only, being considerably less than the value of the property sought to be recovered by the action. *Nevel Norway* having died, letters of administration de bonis non were granted on the 9th August, 1815, to *George Hanley*, the lessor of the plaintiff, the only child of *J. A. H.*, which were stamped by the commissioners of his majesty's stamp duties, with a stamp-duty of 3000*l.* upon security given, and without payment of the duty under the statute. Neither *J. A. H.* nor his administrators or assigns were in any manner prevented, either by water or any other inevitable impediment from working within the limits. In October, 1809, no person having

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in the interval dug for any ore, one *William Brown*, on behalf of *Joshua Rowe*, and other persons, entered into a negociation with *Thomas Carlyon* for a set to be made and granted by the said *T. C.* to the said *J. Rowe* and the other persons, authorising them to dig for tin, &c. and all other metals and minerals *throughout part of the lands* described in the former indenture; which set *T. Carlyon*, about 11th *October*, 1809, verbally agreed to make, and settled with *W. Brown* as to the amount of the dues to be reserved on such set. In the month of *November*, 1809, *T. Carlyon* and *W. Brown* met *J. Rowe* and one *J. Kroger* on part of the land described in the former indenture; and *T. Carlyon* pointed out some of the boundaries of the set to be made to *J. Rowe* and the other persons, and wished them success in their undertaking; and shortly after this the said *J. Rowe* dug for copper, copper ore, &c. within the limits of the verbal agreement. On the 10th day of *July*, 1810, *T. Carlyon* became jointly concerned and interested with *Oliver Woodcock*, *John Carne*, and various other persons, in the mining and searching for tin and tin ore in certain other lands, part whereof lay within the limits of the indenture of the 1st of *March*, 1806; and upon that occasion a memorandum of agreement was made and entered into by *T. Carlyon* and those persons under which the co-adventurers engaged therein dug for tin and tin ore, &c. within the limits of the first indenture, and raised and got a small quantity of tin and tin ore therefrom, and rendered the dues payable in respect thereof to *T. Carlyon*. On the 12th of *January*, 1811, another indenture was made, sealed with the seal of *T. Carlyon*, and by him delivered to *J. Rowe*, by which said last-mentioned

mentioned indenture, it was, amongst other things, witnessed, that *as well in consideration of the surrender of a certain grant or set bearing date the 1st day of March, 1806, made and granted by the said T. Carlyon to the said J. A. H., being the indenture of the 1st March, 1806; as in consideration of certain payments the said T. Carlyon demised the premises in question to J. Rowe for twenty-one years. Upon the said T. Carlyon delivering this indenture, dated 12th January, 1811, to J. Rowe, the latter, who had previously got possession of the one bearing date 1st March, 1806, being the holder of a sixty-fourth share, as a fellow-adventurer with J. A. H. under it, delivered up that indenture to T. Carlyon, but no surrender in writing was ever made or executed thereof to the said T. Carlyon.* The limits mentioned and described in this last indenture, dated *January 12th, 1811*, were not co-extensive with the limits mentioned and described in the indenture dated *March 1st, 1806*, and the works constructed by the said *J. Rowe* were at a distance from and did not communicate with any part of the works done by the said *J. A. H.*, nor were in any manner connected therewith. After the making of the indenture dated *January 12th, 1811*, *J. Rowe* continued to dig for copper and copper ore, and other metals and minerals within the limits specified, and dug and made a mine therein, and got quantities of copper and copper ore therefrom, and disposed of the same, and rendered the dues to *T. Carlyon*. And *J. Rowe*, for the purpose of more effectually prosecuting the works, erected a counting house, stables, and other buildings within the limits. There never was any building within the same limits except those erected and built by *J. Rowe* since the

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execution of the last indenture. The surface of the ground under which the workings of *J. A. H.* were made was waste land which was in possession of the said *T. Carlyon*, and since the execution of the indenture of the 12th *January*, 1811, the persons claiming under the same have, by the permission of *T. Carlyon*, got stone on the waste ground, and used a road over it, and have paid money to *T. Carlyon* for the getting of such stone, and the use of the road. The special verdict then set out the entry of the lessor of the plaintiff, the demise, and the ouster. The case was argued at the sittings before last *Easter* term, at *Serjeants' Inn*, by

Adam for the lessor of the plaintiff. This instrument is not a mere licence, but a lease on which ejectment will lie. It is not disputed that ejectment will lie for a mine; now this is, in legal effect, a demise of a mine. Where all the profits of lands are demised the land itself passes, *Co. Litt.* 4. b., and he gives the instance of the lands passing by the grant of the boillourie of salt. The same law was also laid down in *Parker v. Plummer* (a), *The Queen v. Winter* (b), and in *Parramour v. Yardley*. (c) So if the most signal profit of the land be granted, the land itself passes as in the case of the prima tonsura, *Ward v. Petifer* (d), the fold course, *Co. Litt.* 6. a., herbagium, *Wheeler v. Toulson* (e), prima vestura, *Keilw.* 118. *Palmer*, 174., 1 *Ventris*, 393. Lord *Coke*, indeed, *Co. Litt.* 4. b., intimates an opinion to the contrary in these two latter cases, but the case of *Throgmorton v. Tracy* (f) confirms the former authorities. Then did

(a) *Cro. Eliz.* 190.(c) *Plowd.* 539.(e) *Hardres*, 530.(b) 2 *Salk.* 588.(d) *Cro. Car.* 362.(f) *Plow.* 145.

all the profits pass by this demise. It appears that by the indenture full and free liberty was given to dig for all tin, tin ore, &c. and all other metals and minerals throughout all the demised lands. This is tantamount to a sole grant of all the minerals. For two individuals cannot both have full liberty to dig, &c. one must interfere with the other. Then there is the power to make adits, and the use of all the watercourses: and an exclusive right to the adits, amounts, in fact, to an exclusive right to the ore; for the ore cannot be got but by the adits. Then the right to erect sheds, the use of all the water, the right to make watercourses and to use them, are all conclusive to shew that an interest in the soil passed. And the powers expressly reserved to *Carlyott* are to the same effect. For unless the soil had been granted to *Hanley*, there could be no reason for making such reservations. Then there is the proviso that in case of the breach of any of the covenants *Carlyott* might enter on the demised premises and repossess them. Now unless he had previously been out of possession he could not enter and repossess. It is said that the words used are only words of licence. That may be so, and still they may amount to a demise of the land. For it is laid down in *Bacon Abr. tit. Leases, K.*, that "whatever words are sufficient to explain the intention of the parties that the one shall divest himself of the possession, and the other come into it, for such a determined time, such words, whether they run in the form of a licence, covenant, or agreement, will, in construction of law, amount to a lease." To the same effect are the cases of *Trevor v. Roberts* (a), *Throgmorton*

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(a) *Harl.* 366.

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v. Tracy (a), *Havergil v. Hare* (b), *Jepson v. Jackson* (c), and *Right v. Proctor* (d), where *Yates J.* observed, that the instrument, even as a licence to inhabit, amounted to a lease. The case of *Chetham v. Williamson* (e) is very distinguishable from the present. There it was held to amount only to a licence, and was not considered as a grant, because there was no exclusive right in the grantees to get the coals, but only a concurrent one with the grantor. And the opinion of *Lawrence J.* seems there to have turned upon two points which do not exist here; for here *Carlyon* was seised of the legal estate and no livery was necessary, it being only a lease for years. Then if this amounts to a lease, the second question is, whether there has been any re-entry by which it has been avoided. Now in order to constitute a re-entry, the party must enter with an intent to put an end to the lease. But that was not done here; for neither the transactions with *Brown*, nor the agreement with *Rowe*, who was a co-adventurer with *Hanley*, amount to it. Suppose *Carlyon* had brought an action for a breach of covenant, these transactions could not have been pleaded in bar to it. But the strongest fact of all is, that in the last set there is a recital which shews that the lease to *Hanley* was then in force; for it recites that that set was granted in consideration of the surrender of the lease to *Hanley*; that therefore is a declaration by the lessor that the lease was then in force, and that his previous acts were not done with the intent of putting an end to it. As to the third point, that the stamp on the letters of administration is not sufficient, it

(a) *Floud*. 145.(c) 2 *Lev.* 194.(e) 4 *East*, 469.(b) 3 *Bulstr.* 250.(d) 4 *Burr.* 2209.

is enough to advert to 55 G. 3. c. 184. ss. 45. and 49., by which the commissioners of stamps are authorised to stamp letters of administration de bonis non, and to give credit for the duty.

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Wylde, contra. As to the stamp, it is to be observed, that the act in the 49th section seems only to give power to stamp the letters of administration de bonis non upon credit, where the original letters have been also stamped upon credit, under the 45th section. Here, however, the duty was paid on the original letters of administration. (The Court, however, intimating their opinion, that the case fell clearly within the operation of the 49th section, which applied both to cases where the duty had been paid on the original letters of administration, and those where it had not been so paid; he gave up the point). As to the second point, even supposing this instrument a lease, there has been a sufficient re-entry under the proviso for that purpose to put an end to it. First, it is to be observed that *Carlyon* was already in possession of the lands on which the entry was to be made; for he was to enter on the *lands described in the set*. In such a case no entry is necessary. *Co. Litt.* 218. a. *Digge's case*, 5th resolution. (a) *Shepherd's Touchstone, Condition*, c. 6. *Butler and Baker's case*. (b) If, therefore, a party be either entitled to the legal possession, or be in possession, and the condition be broken, no entry is necessary. But if a re-entry was necessary, there has been a sufficient re-entry here. For in the case last cited, it is expressly laid down, that an entry may be made by acts without

(a) 1 Rep. 174.

(b) 3 Rep. 26.

words.

re-entry. *Co. Litt.* 245. b. *Viney*
3. 17. *Winnington's case*. (a)
re-entry by *Carlyon* did exist; and
ferred to that right, are clearly a
authorised the workings by *Rowe*
pointed out the boundaries, with
time success; and in fact resumed
lands. He participated in the
worked himself, in conjunction with
in another part of the lands.
presumption be made, that all
suaunce of his right of re-entry, he
in almost every part of the land
shew that such presumption could
made. Then can the mere declaration
the set to *Rowe* overcome this
and besides, it being clear that the
vaguely worded, it is not improper
might suppose that the manual delivery
to *Carlyon* amounted to a surrender.
first point made by the plaintiff, it
ment does not amount to a lease.
the question is not to be determined
wording of the instrument; but

that its form is that of a licence. Then there is no consideration stated to be given for it, and nothing certain granted by it; for, at the time, it was not clear that any thing existed which could be granted. It is a licence to search, reserving no rent, except in the case that something was found. If, therefore, the lessor parted with his land on those terms, it would be a most unprofitable bargain. Then if this were a lease, *Hanley* alone would take, and not his co-adventurers, for they are not parties to it. But if a licence, they would take. No case can be cited of ejectment lying for an unopened mine; for how can the sheriff deliver possession of it? And as this is a grant of precise and distinct powers, no other powers can be given by inference. Then what are given? only the liberty to search for minerals, and not the minerals themselves. In the granting part of the deed and the habendum, there is no doubt; and it is only where those parts of the deed are doubtful, that they can be enlarged by reference to the other parts of the deed. In *Norway v. Roe* (a), Lord *Eldon*, speaking of this individual instrument, says, that it is nothing like a demise of mines. That is, therefore, an authority on this very point. The case of *Chetham v. Williamson* (b), strongly shews that a grant of this sort is not exclusive of the grantor. And the words "full right," on which stress has been laid, only mean "free and undisturbed," but not, "exclusive" right; Lord *Mountjoy's* case. (c) The cases of the *boillourie* of salt, *prima vestura*, &c. are all either cases of grants of the whole profits of the land, or the whole profits of the land for a certain time. But here mere

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(a) 19 *Ves. jun.* 158.(b) 4 *East*, 469.(c) *And.* 307. *God.* 6. 17.

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partial profits of the land are granted, for this is not a grant of all the minerals, but of the smelting minerals only; and there is a material distinction between partial profits and those which, though they are the partial profits for the whole year, are nevertheless the whole profits for a time. This instrument, therefore, does not amount to a lease, and as no interest in the land sufficient to maintain ejectment passed under it, the defendant is entitled to the judgment of the Court.

Curr. adv. vult.

ABBOTT C. J. now delivered the opinion of the Court.

This case, which came before the Court upon a special verdict, was lately argued at *Serjeants' Inn*, before my Brothers *Bayley*, *Holroyd*, and myself; my Brother *Best* declining to attend, by reason of his having been formerly engaged as counsel in the cause.

Upon the argument, three principal questions were made; first, as to the sufficiency of the stamp upon the letters of administration under which the lessor of the plaintiff claimed; secondly, upon the legal effect and operation of the indenture of the first of *March*, 1806; viz. whether this indenture operated as a demise of the metals and minerals, so as to vest in the lessee a legal estate therein, during the term, upon the conditions mentioned in the deed, or only as a licence to work, and get the metals and minerals that might be found within the limits described; and, supposing the indenture to operate as an actual demise of the metals and minerals, then, thirdly, whether the acts done by the grantor, and under his authority, amount to, and are to be considered as a re-entry under the proviso, so as put an end to the term of years created by the deed.

Upon

Upon the question relating to the sufficiency of the stamp, our opinion was given at the time of the argument, and it is not necessary to say more on that subject. Upon the second question, it was argued, on the part of the lessor of the plaintiff, that the indenture of the first of *March*, 1806, operated as an actual demise of the metals and minerals, and conveyed the legal estate in them during the term, as a chattel real. This proposition is necessary to the maintenance of the present action, because if the deed operated as a licence only, then, admitting that a party claiming under such a deed, and who should have actually opened and worked, and should be in the actual possession of a mine, might, if ousted of such possession, maintain an ejectment, yet such a right, supposing its existence, (and upon the question of its existence it is not necessary for us to decide,) would not sustain the present action, inasmuch as the defendant was not shewn to be in possession of any mine worked under the deed in question, but only of other mines and parts of the metals and minerals lying at a distance from the workings of the grantee; and which workings had even been long abandoned by him. It is our opinion, that this deed operates as a licence only.

The doubt has arisen from the inaccuracy of some of its expressions, which, seem to import that the grantor supposed himself to have done that by the granting part of the deed, which it is insisted on by the defendant, the words of the granting part do not warrant. But this instrument, though inaccurate, is a regular formal deed, containing all the formal or orderly parts of a deed of conveyance, enumerated by Lord *Coke*, (in *Co. Litt.*

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of the premises or granting part stated by Lord *Coke*, is, "to convey of the tenements" to be conveyed in its granting part, does not purport to grant the metals or minerals therein contained by technical words of demising as known and usually adopted in a conveyance; the intent is to demise the land, and not the minerals; but the purport of the granting part is to grant, for the term therein expressed, licence, power, and authority, to search for metals and minerals, in the lands therein described, and to take away the metals, and minerals only, *if* they be there found, to the use of the parties and their partners, &c.; and it gives also a more effectual exercise of the power. Instead, therefore, of parting with the land by demising all the several ores, metals, and minerals then existing within the lands, the grant was of such parts thereof only as were then existing within the lands, with licence and power given to search for and take away within the described limits, which

the grantor parting with no estate or interest in the rest. If so, the grantee had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals, or minerals, ungot therein; but he had a right of property only, as to such part thereof as upon the liberties granted to him should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines, or metals, or minerals, in the land; and is such a right only as, under the circumstances stated in this case, is not sufficient to support the present action of ejectment. This, we think, is the effect and operation of the deed, considering it with reference to its granting part only; and we are fortified in this opinion by the construction given to similar words of grant in Lord *Mountjoy's* case, *Godb.* 18., 1 *And.* 307., and 4 *Leo.* 147.; and in *Cheatham v. Williamson*, 4 *East*, 469.; even if the liberty granted be to be considered a liberty to get, *exclusive of the grantor*; and a fortiori, if it be, as in those cases, to be considered as not exclusive: that, however, is a point which it is unnecessary for us now to decide. It was contended, that in order to make a demise, or to pass such an interest in the soil as will support an ejectment, formal words of demise need not be used; and that words importing an intent in the grantor to divest himself of the possession for a time and vest it in another, operate in law as a lease, whatever may be their form; and further, that words shewing such intent appear in different parts of this deed. The words alluded to are such as these, viz. "the land hereby granted," "the ground and premises hereby granted," and "the land or ground hereby granted," which occur in some of the

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the clauses and covenants of the deed; and among others, in the clause of re-entry, upon which particular reliance was placed. A proviso for re-entry is in itself not less applicable to a licence to dig, work, mine, and search for metals and minerals, than to a demise of metals and minerals, because, under such a licence, works may be effected, and a corporal possession had, which it may be competent for the grantor to resume; so that the argument rests upon the particular expressions used in the deed, and not upon the nature or quality of the clauses or provisions in which they are used. These expressions may probably be attributed to want of care and caution in the preparation of the deed; but supposing them not to be attributable to inadvertency, or supposing that we should not be justified in so attributing them, still they can, in our opinion, have no further effect, than to shew, that the grantor who used them *supposed* that the soil or minerals, and not a mere liberty or privilege, passed by his deed; and if the words used in the granting part of the deed were of doubtful import, and would bear the construction for which the lessor of the plaintiff contends, such doubtful words of grant, aided by the others, shewing the intent, might be sufficient to pass the land or soil, or minerals themselves, and to support an action of ejectment. But whatever doubts these expressions may cast, yet we think they are not sufficient to vary the construction that must be given to the words of the granting part of this deed, as those words are, in themselves alone, plain and not of doubtful import, and as the proper office of that part of the deed is, to denote what the premises or things are that are granted, and is the place where the intent of the grantor, and what he has actually done in that respect,

spect, is more particularly to be looked for, recourse must be had to the proper and efficient part of the deed, to see whether he has actually granted what it is urged his expressions denote that he supposed that he had granted: for the question properly is not what he supposed he had done, but what he really has done by his grant. For these incorrect expressions, the precise import of which he might not accurately attend to, are not sufficient to constitute a grant, or to operate so as to extend the grant, by converting the things granted from incorporeal to corporeal, and from chattels personal when gotten, into a chattel real, previously to their being gotten, which must be the case, if we were to adopt the reasoning on behalf of the lessor of the plaintiff, as to the effect and operation of the deed, and which would carry the rights of the grantee much further than the grant of a licence or authority extends.

Upon the third question we are also of opinion in favour of the defendant, and think the acts mentioned in the special verdict as done by the grantor, and under his authority, amount to, and are to be considered as a re-entry under the proviso so as to put an end to the term created by the deed. It is clear that the grantor had, under the proviso, a right to re-enter by reason of the grantee's breach of covenant in not effectually working when not prevented by water or other inevitable impediment. The acts done either by the grantor himself, or under his authority, on part of the lands within the above limits, either in consequence of his negociation and agreement with *W. Brown*, or of his agreement with *Oliver Woolcock* and others, or of his indenture made to *J. Rowe*, amount in law, we think,

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the ore, metals, and minerals v
unless those acts be deemed to
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if he was a stranger, the law
shall be punished it shall be an
So in *Co. Litt.* 55. entry into
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implied ouster, and a determi
it would otherwise be a wro
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Co. Litt. 245. b. the mulier's
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terruptions, for (the book
bastard shall punish him in .

It was urged on the part of the lessor of the plaintiff, that the words of the deed of the 12th *January*, 1811, by which that deed is expressed to be made partly in consideration of the surrender of the grant of 1806, together with the fact of the actual receipt of the deed of that date by Mr. *Carlyon*, from Mr. *Rowe*, into whose hands it had come, shewed that none of the acts done by the grantor, were or were intended to be a re-entry under the proviso contained in the deed of 1806. But we think such an effect cannot properly be given to those circumstances, and that they ought to be considered only as matters of caution, intended to preclude the question which, unfortunately, has since been raised. If, therefore, the grant in question can be considered to have been a demise of the land, or of all the ores, metals, and minerals within the limits described, yet it was determined by the above acts done by the grantor, or under his authority, amounting in law to a re-entry; in which case the present action of ejectment cannot be maintained. For these reasons, the judgement of the Court must be for the defendant.

Judgement for the Defendant.

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BARCLAY and Others *against* FABER.

Friday,
June 18th.

THE defendant was arrested in the vacation at the suit of Messrs. *Thuret* and Co. of *Paris*, and on the first day of this term a rule nisi was obtained

A defendant, not privileged from arrest at the time, was arrested on an insufficient affi-

davit to hold to bail, and afterwards, on that ground, discharged out of custody. During his imprisonment, another creditor, without collusion with the former, lodged a detainer against him: Held that such detainer was properly lodged.

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against
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for the defendant to be discharged out of custody on filing common bail, on the ground of a defect in the affidavit to hold to bail. That rule was afterwards made absolute. On the second day of term the plaintiffs lodged a detainer against him, having employed the same attorney as Messrs. *Thuret* and Co. A rule nisi was obtained to discharge the defendant out of custody as to this suit also. On shewing cause the affidavits filed against the rule fully negatived all collusion between the plaintiffs and *Thuret* and Co.

Gaselee and *Wylde* shewed cause. All collusion is negatived, and the defendant being in custody was lawfully detained by the plaintiffs. The ground, therefore, on which the motion was made, wholly fails.

Curwood, in support of the rule, relied on *Spence v. Stuart (a)*, as precisely in point. There, as in the present case, it was ruled that the original arrest being bad, the detainer, which was founded upon it, was bad also.

Per Curiam. The case of *Spence v. Stuart* was determined on a different ground. There the party arrested was privileged from arrest at the time; and it would manifestly be a violation of the privilege if he were not placed by the Court in the same situation as if no such arrest had been made; but here the party, though not properly arrested at first, was not privileged from arrest at the time, and that makes all the difference between the two cases.

Rule discharged.

(a) 3 East, 89.

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HEWITT one, &c. *against* BELLOTT.Friday,
June 18th.

ACTION for an attorney's bill for business done in chancery. The bill had been referred by the Vice Chancellor, to one of the masters of that court for taxation, and upon the taxation more than one-sixth part was taken off. The defendant then presented a petition to the Vice Chancellor, praying that he might be allowed the costs of taxation, pursuant to 2 G. 2. c. 23. s. 23. The defendant not having paid the residue of the bill, the plaintiff pending the application to the Vice Chancellor, commenced an action for the residue of his bill; and a rule nisi having been obtained for setting aside the writ and all the subsequent proceedings for irregularity with costs, it appeared from the affidavits in answer, that the plaintiffs' agents had offered, previously to bringing the action, either to deduct the costs of taxation from the amount claimed, or to give their personal undertaking to pay those costs.

More than one-sixth part of an attorney's bill having been taken off on taxation, the defendant presented a petition to the Vice Chancellor to allow the costs of taxation. Pending this proceeding, the attorney brought his action for the residue of the bill: Held that the action was well brought, the stat. 2 G. 2. c. 23. s. 23. having only prohibited an action being brought pending the reference and taxation.

Scarlett shewed cause against the rule, and contended that the action was properly brought, inasmuch as the statute only prohibited the commencement of an action pending the reference and taxation, and here the taxation was at an end.

Gurney and *Curwood*, *contra*, urged that pending the application to the Vice Chancellor for the costs of the taxation, it could not properly be said to be terminated, and therefore no action could be brought.

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Henry
against
Ballott.

ABBOTT C. J. I am of opinion, on looking at this act of parliament, that this action is maintainable, for the Court are expressly authorised to award the payment to the attorney of the residue of his bill after taxation, and then to award the costs of the taxation to be paid according to the event. And if this were not so, it would give a defendant an opportunity of delaying the other party for an indefinite time, where more than one-sixth part of an attorney's bill has been taken off by omitting to demand the costs of taxation to which he is entitled.

Rule discharged with costs.

Ex parte
June 19th.

WEBB against PLUMMER.

By the custom of the country, the out-going tenant was entitled to an allowance for foldage from the in-coming tenant. Where a lease, however, specified certain payments to be made by the in-coming to the out-going tenant, at the time of quitting the premises, among which there was not included any payment for foldage: Held

that the terms of the lease excluded the custom, and that the out-going tenant was not entitled to any allowance in respect of foldage.

Where the lease also provided that the tenant should, during the term, fold his flock of sheep which he should keep on the demised premises, under a penalty if he omitted to do so. Held, arguendo, that this amounted to a covenant to keep a flock of sheep upon the premises.

ASSUMPSIT. The declaration stated, that the plaintiff being possessed of a farm, was in respect of it entitled to foldage; and that in consideration that the plaintiff would relinquish and give up the possession of the farm, and would permit him to have the benefit of the said foldage, the defendant undertook to make all due and customary allowances, as between in-coming and out-going tenants, for and in respect of the said foldage. At the trial at the last *Sussex* assizes before *Park J.*, the only question was as to the foldage, in respect of which a certain sum was claimed by the plaintiff, who was the out-going tenant of a *Southdown* farm,

from

from the defendant, the in-coming tenant. It was admitted, that by the custom of the country such an allowance was usually made; but the defendant contended, that under the special provisions of the plaintiff's lease, the custom of the country was excluded. The following were the clauses relied on: "And also that the said *Henry Webb* shall not, during the term, carry, or cause or suffer to be carried from off the premises, any hay, straw, corn in the straw, haulm, sheaf, or fodder, muck, dung, compost; or sullage, that shall grow, arise, or be made in or upon the said demised premises; but yearly and every year, in a good husband-like manner, fodder out, lay, spread, spend, and use the same, in or upon some proper part thereof, upon pain of forfeiting three pounds for each load so carried away from the said demised premises; and also shall and will, at all times during the said term, penn or fold his flock of sheep, which he shall keep upon the said demised premises, upon such parts where the same have been usually folded, upon the penalty of three pounds a time for each and every time that the same shall be folded off from the demised premises, or on any other part thereof, than where the same have been usually folded as aforesaid; and also shall and will, in the last year of the said term, at the usual time for moving the dung out of the closes, carry all the dung and manure arising on the premises in the preceding year to such part or parts of the said fallowed lands or grattens as shall be appointed by the lessor, his heirs or assigns or the next succeeding tenant or tenants, and there cast the same into a mixen or mixens, he and they paying for fallowing such land and carrying out the dung, but nothing for the dung itself, and also grass in the

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ground,

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Webb
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ground, and for thrashing out the corn, as is customary between a tenant coming in and a tenant going out of a farm." The learned judge directed the jury to find a verdict for the plaintiff, with liberty to move to enter a verdict for the defendant; and a rule nisi having been obtained in last *Easter* term,

Marryat and *Chitty* now shewed cause. By the general custom of the country, the plaintiff was entitled to compensation for foldage, and there is nothing in the lease to controul that custom. In *Wigglesworth v. Dalison* (a), it was held, that a custom that tenants should have the way-going crops after the expiration of their terms was valid; and it was there expressly argued, that the circumstance of the lease being by deed excluded the custom, inasmuch as the parties must be supposed to have described all the circumstances relative to the intended term in the written instrument. In *Doe v. Snowden* (b), where there was a written agreement for seven years, and where the taking was from *Old Lady-day*, it was said that the custom of most countries would enable the lessee to enter upon the arable land at *Candlemas*, to prepare for the *Lent* corn, without any special words for that purpose; and in the late case of *Senior v. Armitage* (c), a custom for the tenant to provide work and labour, tillage, sowing, and all materials for the same in his way-going year, and for the landlord to make him a reasonable compensation for the same, was held valid, although the farm was held under a written agreement; and this Court held, that unless the agreement in express terms

(a) *Douglas*, 201. (b) *Blac.* 1225. (c) *Holt's N. P.* 197.

excluded

excluded the custom, it was operative; and Lord Chief Baron *Thomson* is reported to have said at the trial, that as to the special agreement, in order to control the custom, it must be of such a nature that it operated upon, and prevented, in express terms, the custom from attaching. Now here the lease does not in express terms exclude the custom. It is true that it does provide for compensation in certain specified cases, and that foldage is not one of those, but non constat that the tenant would necessarily have any such claim; and it was therefore unnecessary to provide for it; for by the terms of the lease he is not bound to keep any sheep at all, but only to fold such as he shall keep upon the demised premises.

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Gurney, Doyley Serjt., and Courthope, contra, were stopped by the Court.

ABBOTT C. J. There is no doubt that, by a special covenant, a party may waive the benefit of the custom of the country, whether general or particular; and the only question is, whether the plaintiff in this case has waived the benefit of being paid for the foldage by the covenants in this lease. Upon considering the whole lease, I am of opinion that he has so waived this advantage, for which, in all probability, he must have received some corresponding benefit. He covenants that he will at all times, during the term, fold his flock which he shall keep upon the demised premises, upon such parts thereof where the same have been usually folded, upon the penalty of three pounds a time for every time the same shall be folded off from the demised premises, or on any other part thereof, than
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where the same had been usually folded. It is said that this covenant does not absolutely bind the tenant to keep as well as fold his flock. I think that it does, but that does not form the ground of my judgement; for the lease further proceeds to bind the tenant, in the last year of his term, to carry all the manure arising on the premises, to such part of the fallowed lands as shall be appointed by the landlord or the incoming tenant; and then there follows a provision as to the payments which are to be made by the in-coming to the out-going tenant, viz. "for fallowing the land and carrying out the dung, but nothing for the dung itself; and also grass in the ground, and for thrashing out the corn, as is customary between a tenant coming in and a tenant going out." There are, therefore, certain payments specified, which the in-coming tenant is to make, but no payment for foldage is mentioned. It must therefore be considered as wholly excluded by the lease. Upon the whole, I am of opinion, that by the express terms of the lease, which specifies certain particular payments to be made on quitting the premises, the custom of the country, as to the payment for foldage, is waived, and, therefore, that the plaintiff is not entitled to recover.

BAYLEY J. I am of opinion, that the plaintiff is not entitled to recover the compensation in question. Where there is a written agreement between the parties, it is naturally to be expected, that it will contain all the terms of their bargain; but if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular. If, however, it specifies any of those terms, we must then go by the lease alone.

alone. The custom of the country applies to those cases only where the specific terms are unknown; and it is founded upon this principle, that justice requires that a party should quit upon the same terms as he entered. If, therefore, the party, when he entered upon the farm, paid for a way-going crop, or for foldage, manure, fallowing, or tillage, then if the lease be wholly silent as to the terms upon which he is to quit, the custom of the country may be introduced, and he may be entitled to receive for a way-going crop, foldage, &c. Upon this ground, *Senior v. Armitage* was determined, for the lease there was wholly silent as to the terms of quitting, and the claim there was different from the present, being a claim for labour done by the out-going tenant, from which he could not himself derive any benefit. Here, too, there is a specific contract to fold the flock upon the premises, under a penalty. My judgement, however, is founded particularly on the last stipulation in the lease, by which the tenant is prohibited from carrying off the manure, and by which the incoming tenant is directed to make certain payments to him; and if a lease speaks distinctly of the allowances to be made upon quitting, it seems to me to exclude all others which are not named.

HOLROYD J. I am of the same opinion. It seems to me, that the covenant in the lease, that the tenant will fold his flock which he shall keep, &c., is binding on him to keep a flock, and fold it on the usual parts of the demised premises. For although the words of a covenant are to be construed according to the intent of the parties, yet they are to be taken most strongly against the party who stipulates. To this covenant
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there is attached a penalty, the only effect of which is to give the landlord an option, either to bring an action for damages for the breach of the covenant to fold, or to proceed for the penalty. But even supposing that there was no covenant to fold in this lease, still, inasmuch as it provides for the payments which the in-coming tenant is to make, it seems to me that its language is equivalent to this, that the in-coming tenant shall pay for such things as are specified, and no more. For the rule *expressio unius est exclusio alterius* applies. Then as the parties have provided for all the payments that were to be made, and as they have not mentioned foldage, it follows that the plaintiff is not entitled to any compensation for it, and that the verdict must be entered for the defendant.

BEST J. I had at first some doubt in this case, but, on looking at the whole deed, I think it was intended by the parties, that it should contain all the terms of quitting, and that the custom of the country should not prevail. In *Wigglesworth v. Dallison*, there were no sufficient circumstances to exclude the custom; and unless it appears that there is nothing to exclude it, the agreement must regulate the rights of the parties. Here the parties have made some stipulation as to the terms of quitting, and if they had intended that this or any other payment should be also made, they would have introduced them into the lease. I think, therefore, that the verdict should be entered for the defendant.

Postea to Defendant.

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SMITH *against* CHANCE.Saturday,
June 19th.

ASSUMPSIT for hay sold and delivered. Plea, general issue. At the trial at the last *Worcestershire* assizes before *Richardson J.* it appeared that the plaintiff was tenant of a piece of pasture land near *Worcester* called the *Further Hill*, which he occupied from *Candlemas*, 1815, to *Candlemas*, 1817, when he quitted the premises in consequence of a notice given by himself. One of the terms upon which he held the land was, that he would consume the hay on the premises, or for every load of hay would bring two waggon-loads of *Worcester* muck, and spread the same. At the time when the plaintiff quitted the possession, a part of a rick of hay was left standing on the premises. This hay the plaintiff sold to the defendant, but without mentioning the agreement respecting the muck. The succeeding tenant, *Phillips*, who had previously given permission to the plaintiff to carry off the hay, provided he would fulfil his agreement with the landlord as to the manure, in consequence of some dispute between himself and the plaintiff as to the terms, immediately upon the defendant's sending persons to truss and carry away the hay, forbade their proceeding to do so, and threatened to bring an action against them if they carried away the hay before the plaintiff had brought on the manure. In consequence of this the defendant desisted, and the

A tenant was bound either to consume the hay on the demised premises, or for every load of hay removed to bring two loads of manure. On quitting possession of the premises, he sold part of a rick of hay then left standing to a purchaser, without mentioning his liability to bring manure. The in-coming tenant refused to allow the purchaser to take away the hay until the manure was brought. After an interval of a month, during which time the hay had been considerably damaged, the latter consented that it should be removed; the purchaser, however, then refused to accept or pay for the same: Held that although the bringing on the manure was not a condition

precedent to the carrying off the hay, as between the landlord and tenant, still, that after the tenant had quitted possession of the premises, the succeeding tenant had a right to refuse to permit the hay to be removed till after the manure was brought on, and that as the vendor had not enabled the purchaser to remove the hay in the first instance, he was not entitled to recover the price.

hay

Judge thought that, inasmuch as manure was not a condition precedent to the hay, the defendant was entitled to the refusal of *Phillips*, to have taken it, and that he might have brought trover for it; and that he might resist the demand made by the plaintiff for the payment of the stipulated price. I found a verdict for the plaintiff. This verdict has been obtained by *Russell*, in last *Term*. I set aside this verdict,

Puller shewed cause. The bringing of this action was no condition precedent to the payment of the price by the plaintiff or his vendee; *Phillips* was wholly unjustifiable in his refusal to deliver the hay, and ought not to have acquiesced in the verdict, but maintained trover. At all events, he ought to have repudiated the contract as soon as he discovered that *Puller* proceeded to cut the hay into tufts, and to put it on hard upon the plaintiff, who has lost the hay by the defendant's neglect, if he cannot now

I am of opinion that neither *Smith* nor *Chance* could, without *Phillips's* permission, have removed this hay from the premises. That permission, as it appears from the evidence, was given sub modo; for *Phillips* only consented that the hay should be taken away, provided *Smith* fulfilled his agreement with the landlord. The learned Judge thought that by that agreement the plaintiff was not bound to bring on the manure till after the hay had been removed. That was so during the possession of the land by the plaintiff, but after the expiration of the plaintiff's tenancy the succeeding tenant might then refuse to permit the plaintiff to carry away the hay till after the manure was brought on. I think, therefore, that the learned Judge was wrong, and that a satisfactory defence was made out in evidence.

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BAYLEY J. The circumstances in which this hay was placed ought to have been communicated to the defendant at the time of the sale. He would naturally suppose that the plaintiff had a right to deliver the hay, whereas the contrary turns out to be the fact.

HOLROYD J. I am of the same opinion. A party cannot maintain an action for the price of goods sold and delivered until he has either delivered them or done something equivalent to delivery; as for instance, if he has put it in the vendee's power to take away the goods himself. But here the defendant was prevented from carrying away the hay by *Phillips*, on whose premises it was standing. And it was incumbent on the plaintiff to have removed that obstacle previously to the sale.

BEST J. concurred.

Rule absolute for a new trial.

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Monday,
June 21st.

WALTERS against MACE.

Declaration stated that defendant went before one R. C. Baron Waterpark, of Waterpark, in the county, &c. and the proof was that he went before R. C. Baron Waterpark, of Waterpark, in the county, &c.: Held that the allegation in the declaration was a description of a name of dignity, and therefore that this was a fatal variance. In a count for slander: the words were, "This is my umbrella: he stole it from my back-door." The words proved were, "It is my umbrella, &c." And it appeared that these words were not spoken in the house where the umbrella then was: Held that the evidence did not support the declaration, inasmuch as the words laid imported to be spoken concerning a thing then present, and the words given in evidence were actually spoken concerning a thing not present at the time.

DECLARATION stated that the defendant went before *Richard Cavendish, Baron Waterpark of Waterfork*, in the county of *Cork*, one of the justices, &c. for the county of *Stafford*, and falsely and maliciously, and without any probable cause, charged the plaintiff with felony, and obtained a warrant to search his house, &c. There was also a count for slander, and the words laid in that count were these, "this is my [defendant's] umbrella, and he [plaintiff] stole it from my [defendant's] back door." Plea not guilty. At the trial before *Garrow, Baron*, at the last assizes for the county of *Stafford*, it appeared in evidence, that the charge was made before *Richard Cavendish, Baron Waterpark, of Waterpark*, in the kingdom of *Ireland*, a justice of peace for the county of *Stafford*; that the defendant obtained a search warrant, under the authority of which he went to the plaintiff's house, and, upon seeing an umbrella, said it was his, but would not swear to it; that he then returned home, and there said, in the presence of a constable, "It is my umbrella, and he stole it from my back-door." *Jervis*, for the defendant, objected, that the two first counts could not be supported, upon the ground of the variance between the description of the title of *Lord Waterpark* in the declaration and proof, and as to the third count, that it was not supported in point of proof, the words being "It is my umbrella," and the words laid in the declaration being, "This is my umbrella;" which purported to be spoken of something

present.

present. The learned judge thought both these objections fatal, and nonsuited the plaintiff. A rule nisi for setting aside the nonsuit was obtained in last *Easter* term, against which rule

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Jervis and *Puller* were about to shew cause, but the Court called upon

W. E. Taunton, contra, in support of the rule. The variance here is immaterial, because the averment does not profess to set out the title of *Lord Waterpark*, but only his name and the place of his residence, which latter may be rejected as surplusage. The averment itself is immaterial, for it would have been sufficient to state that he appeared before *Lord Waterpark*, one of the justices, &c. In *Purcell v. M'Namara* (a) it was held not to be necessary to prove the exact day of the plaintiff's acquittal in the declaration, the day not being laid as part of the description of the record of acquittal, and in *The King v. Lookup*, there cited, where an indictment for perjury, stated the bill in Chancery, to have been directed to *Robert Lord Henley*, &c., and it was directed to *Sir Robert Henley*, Knight, it was held sufficient. [*Holroyd J.* He was both *Lord Henley* at the time of the indictment, although only *Sir Robert Henley* at the time when the bill was filed. It was therefore true that the bill had been directed to *Robert Lord Henley*, though by another name. That is the way in which I have always understood the case.] As to the second point there is no substantial difference between "This is my umbrella," and "It is, &c." and the exact words need not be proved.

(a) 9 *East*, 157.

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ABBOTT C. J. I think the nonsuit was right upon both grounds. The allegation in the declaration must be understood, as containing the description of the name of dignity of Lord *Waterpark*, before whom the party went, and if so, it must be proved as laid. For non constat, but that a different person may have the title mentioned in this declaration. Upon the second point, I also think the nonsuit right. It certainly is not necessary to prove the exact words laid in the declaration; it is sufficient to prove the substance of them: here the words laid in the declaration are, "this is my umbrella," by which the party speaking must be understood to be speaking of something present. The word "*it*" is ambiguous, and imports to be spoken either of a thing present or absent; and if it had been shewn that the umbrella, the subject of the conversation, was present at the time, I should have thought that the nonsuit was wrong, but it was in evidence, that the umbrella was in the plaintiff's house, and that the conversation was in the defendant's; the allegation, therefore, was of something absent. This is, therefore, a variance: the words in the declaration purporting to be concerning something present, and the words proved importing to be concerning something absent. I think therefore that the nonsuit was right on both grounds.

HOLROYD J. I am also of opinion that this nonsuit was right. The plaintiff, by making the allegation that he appeared before a particular person, obliges himself to prove that he appeared before the person described in the declaration. The allegation is, that he appeared before Baron *Waterpark*, of *Waterfork*; the proof is, that he appeared before Baron *Waterpark*, of *Waterpark*, and non
constat

constat but that these may be two distinct names of dignity. It evidently refers to the name of dignity, and is matter of description, and, therefore, is a material variance. As to the count for slander, the words laid in that count import the conversation to have been concerning a thing present, the words in proof import the conversation to have been concerning a thing absent. The words proved do not, therefore, appear to be spoken concerning the same thing, as the words stated in the declaration; and, therefore, as to that count also, I am of opinion that the nonsuit was right.

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BEST J. I am of the same opinion. I think that the words in the declaration "of *Waterfork*" are part of the description of the title, and not merely referable to the place of residence of Lord *Waterpark*, and consequently that this is a fatal variance. I also agree with the rest of the Court, as to the objection upon the count for slander, and think that the nonsuit was right upon both grounds.

Rule discharged. (a)

SWANN, Esq. v. SOWELL.

 Wednesday,
 June 23d.

ACTION against the defendant as maker of a promissory note, dated more than six years ago. Plea, first, general issue; secondly, statute of limitations. At Assumpsit on a promissory note. Plea, first, general issue; 2dly, statute of limitations; But there was no plea or notice of set-off. It was proved that on the plaintiff's shewing the defendant the note within six years, the latter said, "You owe me more money: I have a set-off against it." Held by Bayley and Holroyd justices, Best, justice, *dissentiente*, that that was not a sufficient acknowledgment within six years to take the case out of the statute of limitations.

(a) Bayley J. had left the Court.

3 D 2

the

money, and I have a set-off against you.
“Furnish me with your account, and I will swear to a debt, if I owed you; or if you will not furnish me with your account, I will put the hands of my solicitor;” then the defendant said, “You may do as you please: I will not give any contradictory evidence as to the facts of the case. The case went ultimately to the jury, and the jury found for the plaintiff. *Adam* in last *Easton v. Burt* for setting aside this very learned Judge’s opinion, and then the Court said, “On shewing cause the Court sustained the writ. The result of that, there was not sufficient evidence to take the case out of the statute, and the case was to be argued.”

Pell Serjt., and *Selwyn*, for the defendant, in order to take a case out of the statute, it was not necessary that there should be a promise to pay; it was sufficient if the debt amounted to an action of debt. For then the law

BAYLEY J. (a) As we are all satisfied that there must in this case be a new trial, it is not necessary to call upon the other side. I am of opinion that this declaration, even if implicit credit be given to the witness, is not sufficient to take the case out of the statute of limitations. The question in these cases always is, whether the admission, where no express promise to pay is made, be sufficient for the law to raise from it an implied promise. If a party admits the debt, and does not say that it is satisfied; or refuses to pay it, alleging at the time an insufficient excuse for not paying it, the law will in these cases raise an implied promise to pay the debt then acknowledged to be due. But if at the time the party states that the debt is discharged, that surely can never be considered as an acknowledgment of a subsisting demand, so as to raise such an implied promise. Now here the party admits the bill to be in his hand-writing, but says that he has a set-off to more than the amount. The forbearance on each side may have been mutual, and the case is exactly within the intent of the statute; for during the six years' delay, the witnesses capable of proving the set-off may be dead, and the party may be as incapable of proving it as in the case where payment is alleged. I think, therefore, that this declaration is not an acknowledgment of a subsisting demand, and consequently will not take the case out of the statute. On the other ground, also, I am of opinion, from the learned Judge's report, that this is a verdict clearly against the weight of evidence, and that there ought to be a new trial on both points.

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(a) Abbott C. J. was absent.

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HOLROYD J. I am of the same opinion on both points. There was not sufficient evidence to raise a new promise, or rather to revive the original promise to pay; for the party, instead of admitting a subsisting demand, insists at the time that the plaintiff has no demand against him. The reason why an acknowledgment takes a case out of the statute is, that it thereby appears that the demand has not been satisfied; and though such acknowledgment be accompanied with an actual refusal to pay, yet if it be admitted that the debt is unsatisfied the law will, notwithstanding, revive the original promise to pay the debt. But it would defeat the whole intention of this salutary statute if we were to hold this acknowledgment to be sufficient. The declaration here is in substance this; "Though I did originally owe this money, yet the debt has been satisfied by a set-off." If that takes the case out of the statute, a plaintiff will gain a great advantage in such a case, by waiting till the witnesses are dead who can prove the set-off; and then entrapping a defendant into such a declaration as this. How can it be contended that an assertion by a defendant that he has a good defence is an acknowledgment of the debt? The case of the declaration of a party on being arrested that he had had the meat, and that 26*l.* was due, but that six years had expired, is quite different. There he admitted the debt to be unsatisfied at the time, and on that ground it was that the decision of the Court was founded. On the other point I agree that there should be a new trial, this verdict being clearly against the weight of evidence.

BEST J. It was not suggested at the trial that the words proved to have been used by the defendant ought not to be left to the jury for them to say, whether, if

true, they amounted to an acknowledgment of the debt. If such an objection had then been made, I should have directed the jury to find whether the defendant had used the words stated by the witness, and if they found that he had, then as there was no plea, nor notice of set-off, I should have told them that this was a sufficient acknowledgment to take the case out of the statute. And I am now of opinion, on the authority of the cases of *Lloyd v. Maund* (a), and *Rucker v. Hannay* (b), that there was sufficient evidence in this case to be left to the jury to consider whether it amounted to an acknowledgment of the debt. I agree with my brothers, that effect is to be given to the whole of the words used, so far as those words bear on the issue to be tried. If the witness, therefore, had said that the defendant had acknowledged that the debt once existed, but added that it was *paid*, I should have nonsuited the plaintiff; because payment destroys the original debt, and may be given in evidence under the general issue; but a set-off does not destroy the original debt, and cannot be given in evidence without a plea, or a notice of set-off. Now I cannot distinguish between matter of set-off, proved by declarations of the defendant, made at the time of his acknowledging the plaintiff's demand, and the same matter proved by any other witness. It seems to me, that in neither case it is evidence under the general issue. If it were, the plaintiff should, at all events, be permitted to prove that what the defendant said, as to the set-off, was not true; but the plaintiff would not come prepared with evidence to shew the falsehood. In fact, the falsehood of that part of the declaration

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(a) 2 T. R. 760.

(b) 4 East. 604.

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has nothing to do with the question raised by the pleadings, which is only as to the existence of the debt. Besides, by giving effect to that part of the declaration, we might do great injustice to the plaintiff; for if the defendant afterward brought an action for his demand against the plaintiff, the latter could not say, "You have already had satisfaction for your debt, by setting it off against my demand in another cause." For it would appear on the production of the record in the previous cause, that there was no plea of set-off, and the defendant in the second cause could not shew that there was any notice of set-off; although, therefore, the plaintiff on such evidence might lose his demand on the defendant, he might be compelled to pay the defendant's demand on him. I however fully agree with my brothers that there ought to be a new trial. I was of opinion, at the time, that the weight of evidence as to the fact of this declaration ever having been made was clearly with the defendant, and I intimated that as my opinion to the jury. They, however, found a verdict the other way; and I, therefore, think that the justice of this case requires that these facts should be again submitted to the consideration of another jury, and that this rule should be made absolute.

Rule absolute for a new trial.

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SWALLOW *against* BEAUMONT.Wednesday,
June 23d.

COVENANT. The declaration stated that by a certain indenture made between the defendant and the plaintiff, it was witnessed amongst other things, that *as well* for and in consideration of the sum of money which the plaintiff had already expended in the erecting and building three blast-furnaces, a steam-engine, and other buildings requisite or necessary for the purpose of smelting iron-ore into pig-iron, or other castings, on part of the close called *Dove-coat Close*, thereafter described, he the defendant did demise, &c. Plea, *non est factum*. At the trial at the last *York* assizes, before *Richards* C. B. the consideration stated in the deed produced was as follows: "That as well for and in consideration of the sum of money which the said *R. S.* hath already expended, in the erecting and building three blast-furnaces, a steam-engine, and other buildings requisite or necessary for the purpose of melting iron-ore into pig-iron, or other castings, on part of the close called *Dove-coat Close*, hereinafter described; *as also in the erecting and building ten dwelling-houses for workmen in the said close; and also for and in consideration of the yearly rents and reservations, covenants, and agreements thereafter reserved and contained, on the part and behalf of the said R. S., his executors, administrators, and assigns, to be paid, kept, done, observed, performed, and fulfilled,* he the said *T. R. B.* did demise, &c. The learned Judge being of opinion that this was a fatal variance, the plaintiff was nonsuited. *Little-dale* in last *Easter* term obtained a rule nisi for setting aside

In an action of covenant, the declaration stated, that by a certain indenture it was witnessed that, as well in consideration of certain furnaces to be erected by the plaintiff, *T. R. B.* did demise, &c. The defendant pleaded *non est factum*. On producing the deed in evidence, it appeared to be, that as well in consideration of the erection of the furnaces as also for building certain houses and payment of rent, *T. R. B.* did demise, &c. Held that this was a fatal variance.

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 against
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aside this nonsuit, on the ground that as the consideration was wholly immaterial, a variance in setting it out was not of importance. And now

Scarlett, Tindal, and Gregson, who were to have shewed cause, after observing that the question arose on the plea of non est factum, were stopped by the Court, who called upon

Littledale, Williams, and F. Pollock, to support their rule. In declaring on parol contracts it is necessary to set out the whole consideration, inasmuch as the promise, by itself, forms no sufficient ground for maintaining the action. There the entire consideration for the act, and the entire act to be done, in virtue of such consideration, must be set out. *Clarke v. Gray*. (a) But in contracts under seal that is not necessary. In an action on a lease, the declaration needs only state so much of the covenants as is applicable to the case. Here it was wholly unnecessary to have set out any consideration. And if it had been set out, no evidence could have been given upon it. If so, it is entirely surplusage, and a variance in setting it out will be immaterial. Besides here the declaration states, that “as well for the considerations mentioned, *T. R. B.* did demise.” Now that obviously implies that the deed contained other considerations besides those mentioned in the declaration. In *Bristow v. Wright* (b), and *Savage v. Smith* (c), the variance was in a part important to the subject matter of the action, which distinguishes those cases from the present. The

(a) 6 East, 564.

(b) Douglas, 667.

(c) 2 Blackst. 1101.

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SWALLOW *against* BEAUMONT.Wednesday,
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Saturday,
June 26th.

BROWN *against* JENNINGS.

Bail having been put in and justified, the defendant pending a rule nisi for setting aside the allowance of such bail was rendered. The rule nisi being afterwards made absolute an assignment of the bail-bond was taken. Held that such assignment was regular, the render under such circumstances being insufficient.

A RULE nisi was obtained for setting aside the proceedings on the bail-bond for irregularity, on the ground, that the defendant was rendered before the assignment of the bail-bond. The facts appeared to be these: The defendant was arrested on a special *capias*, returnable on the 25th of *April*, on the 3d of *May* special bail was put in with the filacer, and on the fourth an exception entered; on the fifth, notice of adding and justifying bail was given for *Friday* the 7th, when they justified. On the 10th a rule nisi was obtained for setting aside the allowance of bail, on the ground that one of the bail had perjured himself, as to the amount of his property. On the 13th, cause was shewn against this rule, when the Court ordered, that the case should stand over to the 21st, that the bail might be again examined as to their sufficiency; they not appearing for that purpose, the rule was made absolute on the 21st; on the same day the defendant rendered himself before the sitting of the Court, and the plaintiff had notice of that render by 12 o'clock at noon. The bail-bond was assigned on the 22d.

E. Lawes now shewed cause, and contended that this case must be governed by *Jackson v. Morriss* (a). Here the time for rendering expired on the 8th, and unless the principal be rendered, or the bail above justified in due time, the bail-bond will be forfeited and an assignment of it may be taken at any time afterwards. He

(a) *Black.* 1179.

also

also cited *Meysey v. Carnell* (a), and *Rex v. Sheriff of Middlesex*. (b) Besides here the render was wholly invalid in consequence of the gross misconduct of the bail.

1819.

BROWN
against
JENNINGS.

Marryat, contra, contended, that this case was governed by the same principle as those of attachments against the sheriff, which can not be moved for after a render. Here, if the bail above, had been rejected on the 7th the defendant might have been rendered on the 8th; and the party ought not merely to be placed in a worse situation, than if that had been the case. No instance can be found where an assignment of the bail-bond has been taken either after a render or after a justification of the bail above.

ABBOTT C. J. In this case there was a justification and a rule for the allowance of bail; a rule for setting aside that allowance is then obtained, and pending, which the render takes place. The rule for setting aside the allowance being made absolute, the plaintiff afterwards takes an assignment of the bail-bond. It is not necessary for us to decide generally whether such an assignment can be taken after a render or justification of bail above, subsequent to the time allowed for such render or justification, because I am of opinion, that under the special circumstances of this case, the render was not sufficient. If that were not so, the defendant would derive an advantage from his own misconduct having improperly put in bail above. I therefore think that the assignment of the bail-bond ought to stand, and that this rule should be discharged with costs.

(a) 5 T. R. 534.

(b) 7 T. R. 527.

Tuesday,
June 29th.

STEWART against BR.

The chief clerk
is not entitled
to poundage on
money paid into
Court by the
sheriff, under
43 Geo. 3. c. 46.
s. 2.

THE defendant was arrested for term, 1817, and paid the the statute 43 Geo. 3. c. 46., to th in lieu of giving a bail-bond, into Court 3028*l.*, having retain*mission*, 2*l.* for extra trouble. having been settled at 3000*l.*, t back from the plaintiff's attorney sum of 3028*l.* had been paid(*a*), t but the plaintiff's attorney refused ing to hold it on behalf of the ch as for his claim of poundage of monies paid into Court.

Scarlett obtained a rule nisi, ca attorney to pay over the balance been given to the officer of the C

Campbell appeared for plaintiff's consented to any rule which th

Gaselee, for the officer of the Court, contended that by the rule 5 *Jac.* 1., A. D. 1607, this fee was demandable. By that rule 20s. per cent. was ordered to be paid, as a fee to the chief clerk, by every party paying money into Court. Now the 43 G. 3. c. 46. s. 2., under which this money was paid into Court, does not break in upon this rule, which was made in consideration of the responsibility imposed on the officer who has the charge of the money. And though the statute has certainly omitted to direct expressly, that this deduction should be allowed, still when it directs that the money should be paid into a Court, where certain fees are usually demanded, it impliedly makes it liable to those reasonable deductions.

Scarlett, in support of the rule, was stopped by the Court.

ABBOTT C. J. This does not fall within the rule of Court, 5 *Jac.* 1., referred to. For that rule only applies to cases where a party, *at his own request*, pays the money into Court. Here, however, that is not the case, for it is paid in under the provisions of an act of parliament, not by the party to the suit, but by the sheriff. Now, in the statute itself, I can find nothing which authorises such a deduction. The contrary appears to me to be the case. For the second section of the 43 G. 3. c. 46. directs the sheriff to pay into Court *the sum of money so deposited*, and in another part the act speaks of *the said sum of money so deposited as aforesaid*. The act, therefore, seems to me to refer to the whole sum paid to the sheriff, and to make no provision for the payment of any fee or deduction thereout. Then if this fee does not fall within
the

1819.

STEWART
against
BRACEBRIDGE.

officer was fairly entitled to his responsibility, in having money, and that the amount 5 Jac. 1. was reasonable. But of parliament, I am of opinion be allowed. The act says, it shall be paid out. Now, if at it no longer remains the money true construction of the act, the money paid into Court shall be

HOLROYD J. I am of the rule of Court only extends into Court, at the request of a that is not the case here. And the statute; for the second section allowance of any such fees or disbursements of parliament casts a duty on the officer to expressly give him a compensation. I have decided, that he is entitled to me, that the officer of the Court shall be allowed. I think, therefore, that it shall be allowed.

where money is voluntarily paid in by the suitors of the Court for their own convenience, a fee is demandable. And that seems to be a reasonable thing. But here the money is not paid in voluntarily, nor by the party, but under the directions of an act of parliament, and by the sheriff. If the legislature create a duty, for which they give no remuneration, this Court cannot interfere for that purpose. We cannot create a new fee where none has been given by the legislature. This rule must, therefore, be absolute.

1819.

STEWART
against
BRACKERIDGE

Rule absolute.

DOE on the Demise of HENRY REYNELL *against*
ELIAS TUCKETT and JOHN RENDALL.

Tuesday,
June 29th.

BINGHAM had obtained a rule nisi to amend the declaration in ejectment by enlarging the term which had expired, in order that the plaintiff might sue out a *scire facias* to revive the judgment and take out a writ of possession. By the affidavits it appeared that the action was commenced in 1798, and that the plaintiff obtained a verdict for one-sixth part of the premises at the Spring Assizes 1799, and judgment was entered up on the 23d of *July* 1799, but no writ of possession was ever issued. In 1799 *Elias Tuckett*, the defendant, died, and in 1801 a fresh ejectment was brought against *Philip Debell Tuckett*, nephew and heir of *Elias Tuckett*, for the remaining five-sixths, on which occasion the plaintiff was nonsuited. In 1809 a third ejectment was brought against the same party for the whole, and the defendant then obtained a ver-

Where a long period had elapsed after judgment signed, and no delays had been interposed by the defendant in the mean time, the Court will not permit the term in the declaration of ejectment to be enlarged for the purpose of the plaintiff's suing out a *scire facias*, in order to revive the judgment, and take out a writ of possession.

Casberd shewed cause, and amendment could not be allowed. The Court suffered this matter to sleep for a long time, and must take the consequence of his delay. In cases where the Court have allowed amendment, the delay had been occasioned by the plaintiff. Here there have been two parties, and the present possessor is not responsible for the defect of the plaintiff's title. In *Stanton (a)*, *Roe v. Ellis (b)*, the cause was dismissed, and in *Vicars v. Haydon (c)*, the Court refused to amend in Chancery preventing the plaintiff from proceeding. But in an anonymous case, *Salk.* 131. the Court refused to enlarge the term without the cause being amended.

Scarlett and *Bingham* contra. The Court will moderate the fictions of law to do justice, and will not (by refusing amendment) leave the party, who has already received a writ of right. It is obvious that the cause has been owing to the plaintiff's mistake, and he is entitled to the whole, and not to a part only. The Court will therefore allow amendment.

facias, *Proctor v. Johnson*. (a) And in addition to the cases mentioned, where such an amendment as this has been allowed, is the case of *Oates v. Shepherd* (b), in which it was done without consent.

1819.

DOE
against
TUCKER

ABBOTT C. J. I should very much doubt, even if the term were sufficiently large, whether the Court ought to allow a *scire facias* to issue in such a case as this; but I am clearly of opinion, that we ought not to allow this amendment to be made. Such an application ought most undoubtedly not to be granted, if we saw that it would work injustice. But that is not enough. The Court ought to be satisfied that the granting of the rule will work no injustice. Now that is not clearly shewn in this case. If a writ of possession had been originally sued out, the defendant might have brought another ejectment and recovered the possession. But now his witnesses may be dead. Here too there have been two descents, and the present possessors may not be aware, as the former possessors were, of the defects in the plaintiff's title. If we were to grant this rule, we should be giving encouragement to procrastination. I am therefore of opinion that this amendment should not be allowed.

BAYLEY J. I cannot believe it possible that the plaintiff would for 20 years have delayed suing out a writ of possession, unless he had been conscious of some fatal defect in his own title.

HOLROYD and BEST Js. concurred.

Rule discharged with costs.

(a) *Ld. Raym.* 669. , (b) 2 *Strange*, 1272.

the defendant offered to pay with all costs to that time; the plaintiff's attorney refused to stay proceedings on those terms, and the defendant paid that sum into Court; but the Plaintiff afterwards finding that he could not support the action for the other part of his demand, took the money out of Court and discontinued the action: the Court allowed the defendant his costs, from the date of his offer to pay the sum paid into Court, and directed that the same should be set-off against the plaintiff's costs previously incurred.

in the hands of the defendant summons had been taken out on payment of the sum which both parties attended and the plaintiff's attorney refused upon the payment of the attorney afterwards proceeded delivered a declaration containing a count for interest of the defendant then pleaded, and pleaded counts, except that for interest plaintiff's attorney afterwards attended Court, and served an appointment for costs; and upon attending the Court insisted on full costs, which the

A rule nisi having been obtained it to the Master to tax the plaintiff's costs up to the 8th day of May, and costs subsequently to that date. As costs were taxed, the plaintiff's costs were deducted from the amount of

be entitled in the action for the residue. The plaintiff is not bound to go on with the action, at the risk of being obliged to pay the defendant's costs, he having paid the smaller demand into Court.

1819.

JAMES
against
RAGGETT.

Per Curiam. This is a most reasonable application. The plaintiff's offer to stay the proceedings upon the defendant's paying the costs now comes too late, costs having been incurred subsequently to the 8th of *May*. It is consistent with justice that the defendant should be at liberty to set off the costs he has incurred since the refusal of his offer against those of the plaintiff up to the 8th of *May*, when the summons was taken out.

Rule absolute.

BONES *against* PUNTER.

Wednesday,
June, 30th.

ACTION on a bill of Exchange. Defendant pleaded to the whole declaration; first, a judgment recovered in the common pleas; and, secondly, by leave of the Court, the delivery of a hogshead of tobacco in satisfaction. A rule nisi had been obtained for liberty for the plaintiff to sign judgment for want of a plea, on the ground that the defendant had pleaded false pleas, requiring different modes of trial. There was not any affidavit in the first instance, that the pleas were false; and after hearing *Bingham* against, and *Chitty* in support of the rule, the Court said that an affidavit of the falsehood of the pleas was necessary, but they enlarged the rule to enable

Defendant pleaded two pleas requiring different modes of trial. Held that on producing an affidavit of the falsehood of the pleas, the plaintiff was entitled to sign judgment.

rate to have moved to discharge 1

Per Curiam. The rule to pleas as a matter of course in this Court properly obtained; and it now pleas are false, the plaintiff is enti

Wednesday,
June 30th.

SMITH and Others against C

A letter from a principal to his factor containing bills of exchange drawn upon the latter, and in which the principal promised to provide for the bills, if certain goods, then either in the factor's possession or about to be placed in his hands, should remain

TROVER for oats, &c., pleaded trial before Abbott C. J., and after Hilary term, it appeared that corn-factors resident in London, in question, as indorsees of a bill & Co. The defendant, Cator, house of Hunt and Co. of Riga shipped the oats by the order, Laing and Co., and drawn bills plaintiffs were employed by La

them, on the security of grain, which *Laing and Co.* either placed or promised to place in their hands. The question in the case was, whether the following letter, which was produced by the plaintiff in evidence, required a stamp, or whether it came within the 54 G. 3. c. 84, as a letter or agreement made for, or relating to the sale of goods, wares, or merchandises? It was addressed to the plaintiffs by *Laing and Co.* and bore date the 3d September, 1818. — “ Herewith we hand you the bills for 5000*l.*, for your acceptance, for which we engage to provide you with funds to retire them, should the following quantities of grain in hand, against which they are drawn, remain unsold at the time of their falling due.” The letter then specified the quantity of oats then in their hands as amounting to 4000*l.*; a second parcel in *Glasgow*, in the hands of a person of the name of *Duncan*, valued at 2900*l.*; and oats at *Riga*, which were the oats in question, valued at 1246*l.*; and then proceeded — “ For the two last purchases of oats, we expect to hand you bills of lading in a few days; in the mean time inclose *Duncan and Co.*’s invoice, and that of *R. Hunt and Co.*, which we hereby make over to you, in conformity with our arrangement, taking to ourselves the risk of profit and loss that may arise.” The plaintiffs accepted the bills, and *Laing and Co.* indorsed the bill of lading to them, which arrived on the 16th October, and was delivered to *Laing and Co.*, about twelve or one o’clock on that day. On the following day they stopped payment. *Abbott C. J.* was of opinion that this letter came within the exception of the stamp act; and, therefore, received it in evidence; but reserved liberty to the defendant to move to enter a non-suit, and a rule

1819,

~~Suit~~
against
Case

1819.

SMITH
against
CATON.

nisi for that purpose was obtained in last *Easter* term, against which

Scarlett, Marryatt, and F. Pollock, now shewed cause. It appears that the oats which are the subject of this action, were to be placed in the plaintiff's hands to be sold, and the letter itself related to such sale; for they are to provide funds, if the oats remain unsold. It is true, that it contains something more than what relates to the sale of goods; but still it is connected with that subject. In *Curry v. Edensor* (a), the broker who had purchased the goods, engaged for half per cent. to indemnify the plaintiff from any loss; still it was held that a written memorandum of that agreement need not be stamped; because it was a contract relating to the sale of goods; and in *Venning v. Leckie* (b), the defendant agreed to take one-half of the goods bought by the plaintiff, on their joint account, and to furnish him with half the amount for the payment thereof, if required; and it was held that that agreement related to the sale of goods, though it also contained a contract of partnership. These cases establish that, if the memorandum or letter in any way relate to the sale of goods, although it contain other matter, it comes within the exception of the stamp act.

Gurney and Tindal contra. The exception of the stamp act can only extend to cases where a sale is the primary and immediate object. If it were otherwise, every agreement for a pledge, containing also a power

(a) 3 T. R. 524.

(b) 13 East. 7.

of sale, would fall within it, or even a security upon a man's household furniture for the benefit of his creditors. The decided cases shew that an actual sale must be intended as the basis of the agreement; here there was no sale as between these parties; it was not even an agreement that the plaintiff should sell for the purpose of satisfying the debt; the agreement was to provide the plaintiff with funds, in case the grain remained unsold; it did not even communicate to the broker a power to sell, which he already had in the ordinary course of his employment. In *Curry v. Edensor* the agreement for commission was made at the time of the original contract of sale, and that distinguishes that case from this. In *Venning v. Leckie* the contract related to the payment of the price of goods, purchased by the plaintiff, on the joint account of himself and the defendant; that case however goes very far; it was in fact an agreement by the defendant to buy half the goods.

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 SMITH
 against
 CATON.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court. In this case we are of opinion that the letter of the 3d September 1818, from *Laing and Co.* to the plaintiffs, required to be stamped, as an agreement, and did not fall within the exception of the act, by which a memorandum letter or agreement made for or relating to the sale of any goods, wares, or merchandise, is exempted from the duty. We think that description is confined to instruments whereof the sale of goods is the *primary* object, and it appears to us that the primary object of this letter was the obtaining of money upon a pledge of goods expected to arrive
 in

1819.

SMITH
against
CATOR.

in *England*, and intended to be placed in the hands of the plaintiffs upon their arrival. It is true that it was also further intended, that the goods, if they had arrived, and been placed in the hands of the plaintiffs, should be sold by them, that they might by the proceeds discharge their bills, or reimburse their advances; but this was a secondary or collateral object, and in that respect, the present case differs from the case of *Curry v. Edensor*, which was cited on the part of the plaintiffs, wherein the primary object of the writing was the purchase of goods, to which the guarantee against loss was secondary or collateral only. The rule for entering a nonsuit must therefore be made absolute.

Rule Absolute.

Wednesday,
June 30th.

DOE, on the demise of PUTLAND, against
HILDER.

A term of years was created in 1762, and assigned over, to a trustee in 1779, to attend the inheritance. In 1814, the owner of the

inheritance executed a marriage settlement; and in 1816, he conveyed his life interest in the estate to a purchaser as a security for a debt; but no assignment of the term or delivery of the deeds relating to it took place on either occasion. In 1819, an actual assignment of the term was made by the administrator of the trustee in 1779, to a new trustee for the purchaser in 1816. Held that under these circumstances, on an ejectment brought by a prior incumbrancer, against the purchaser, the jury were warranted in presuming that the term had, previously to 1819, been surrendered.

Held also, where a tenant had come into possession of the premises in 1816, and the lessor of the plaintiff claimed under a writ of *elegit*, and inquisition thereon, issued in 1818, but founded on a judgment recovered prior to 1816, that no notice to quit was necessary.

debted

EJECTMENT for a certain piece of marsh land situate at the parish of *Hurstmonceur*, in the county of *Sussex*. At the trial before *Park J.*, at the last Spring Assizes for that county, the following facts appeared in evidence. In 1808, *Richard Newman*, being in-

debted to the lessor of the plaintiff, executed a warrant of attorney to confess a judgment to the amount of 4000*l*. The judgment having been accordingly entered up, was revived in 1818 by *scire facias*, and a writ of *elegit* issued thereon. An inquisition was taken under this writ on the 13th *March*, 1818, by which the premises in question were extended as one moiety of the hereditaments of *Richard Newman*, in the possession of the defendant. The defendant, in 1816, became tenant to Mrs. *Sarah Newman*, to whom, in that year, her son, *Richard Newman*, had conveyed his life-interest and his reversion in the premises as a security for a debt, without any notice of the judgment signed in 1808. No notice to quit had been given to the defendant. In 1762, a regular mortgage term of 1000 years was created by *Francis Hare Naylor*, then the owner of the fee in these and other premises of greater value, and several further charges were made previously to, and in the year 1770. In 1771, *Naylor* devised the estate to trustees to sell. In 1779, they sold and conveyed these premises to *John Newman* in fee, and the term was assigned to *William Denman*, his executors, administrators, and assigns, in trust for *John Newman*, his heirs and assigns; and to be assigned, conveyed, and disposed of, as he or they should direct and appoint; *and in the mean time and until such appointment to attend and wait upon the freehold and inheritance of the same premises*. The estate descended from *John Newman* to his nephew, *Richard Newman*, who in *October* 1814, on his marriage, settled the estate to the use of himself for life, with remainder over in strict settlement. On the 17th *March*, 1819, (after the commencement of this action,) *John Denman*, as the

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 Dox
 against
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inheritance. The deed creating
was produced by a purchaser of
value of the estate comprised in it
and 1819, were produced by
questions were made. First, that
these circumstances, was entitled
Secondly, that the out-standing to
plaintiff's case, the legal estate
him. The learned judge was of
defendant, on the first point; and
directed the Jury to presume a
The Jury having accordingly found
plaintiff, *Gurney*, in last *Easter* term
nisi, for setting aside the verdict
cause was new shewn by

Marryatt and *Abraham* for the
tiff. They contended, first, that
ranted in presuming a surrender
of justice required it. Here there
no notice of from 1779 till 181
this trial. And yet there were man-
veyances, and one marriage sett

Doe v. Wright. (a) But at all events, this case falls within 29 Car. 2. c. 3. s. 10., by which the sheriff is required to deliver execution of all such lands, &c. "as any other persons be in any manner seised or possessed in trust for him, against whom execution is sued, like as the sheriff could, if the party had been seised of such lands and of such estates as they be seised of in trust for him, at the time of the execution sued." Now a trust to attend the inheritance, is a trust for the owner of it, and the owner of it was *Richard Newman*, against whom the execution was sued out. And it is observable, that the words are, "seised or possessed." So that they appear to have been intended to cover all cases. As to the notice to quit, none was necessary in this case, because the judgment bound the lands from the time of its being signed; and so the lessor of the plaintiff comes in by a title, paramount to the landlord of the defendant. They were then stopped as to this point by the Court.

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Doe
against
HILDER.

Gurney, Comyn, and Sugden, contra. A notice to quit in this case was necessary; because, until the execution of the writ of elegit, it was uncertain which moiety of the estate would be extended, and the defendant came in as tenant before the writ of elegit was sued out. [*Abbott C.J.* How can a notice to quit be necessary, when the judgment, which was signed in 1808, bound the land from that period; and if it would bind a purchaser in fee, why should it not equally bind a tenant for a term of years? *Holroyd J.* The sheriff is directed to give possession of the specific land occu-

(a) *Ante*, p. 710.

pired

1819.

Doct
Agg
Hibb.

plied by the defendant: the freehold being extended under the writ, it avoids the lease in toto.] As to the second point, this differs from any of the cases cited: for there the presumption of the surrender of the term was made in favour of the owner of the inheritance, but here it is to be made against his interest. Any thing which clogs the free alienation of property is detrimental, and therefore the Court ought as far as possible to protect the interests of purchasers. It was for this purpose that these terms were introduced, viz. to protect the estate in the hands of a purchaser from the effect of mesne incumbrances, *Evans v. Bicknell*. (a) It is said that no notice is taken of this term in the marriage settlement of 1814. But it is not usual to do so. A term is not usually assigned either on a devolution of the estate from ancestor to heir, or on a marriage settlement; when once assigned to attend the inheritance, it is considered as always assigned for that purpose. The case of dower has always been considered as the excepted case, and was so stated by Lord Eldon in *Maundrell v. Maundrell*. (b) As to the possession, the question is whether that has been inconsistent with the existence of the term. *Keene v. Deardon*. (c) Possession is indeed evidence of title, but not whether that be a legal or an equitable title. And the owner of the inheritance being considered as tenant at will to his trustees, his possession is the possession of the trustees. *Freeman v. Barnes* (d), *Dighton v. Greenvil*. (e) Here there has been nothing inconsistent with the subsist-

(a) 6 Ves. 184.

(b) 10 Ves. J. 246.

(c) 8 East. 248.

(d) 1 Ventr. 82. 1 Sid. 460. S. C.

(e) 2 Ventr. 329.

ence of the term. And if the mere lapse of time be sufficient, it will become a difficult question hereafter to ascertain how often a term must be assigned in order to rebut the presumption of its being surrendered. This doctrine will in practice be found extremely inconvenient, and may prejudice many titles which are at present considered as good. Here too the circumstances relied on in *Doe v. Wright* (a) of the deeds being in the possession of the owner of the inheritance do not occur. They also cited upon this point *Doe v. Sybourn* (b), *Goodtitle v. Morgan* (c), and *Willoughby v. Willoughby*. (d) Then supposing the term not to be surrendered, it is clearly not within the 29 Car. 2. c. 3. s. 10. First, every attendant term is at law a chattel real, a term in gross. This was laid down by Lord Hardwicke in *Willoughby v. Willoughby* above cited. It cannot therefore be taken in execution for the debt of the *cestui que trust*. *Lyster v. Dolland* (e), *Shirley v. Watts* (f), *Burdon v. Kennedy* (g), *Scott v. Scholey* (h), *Metcalf v. Scholey*. (i) In a case like this, where there is a term of years in A. with a remainder in fee in the debtor, the proper course for the judgment creditor to pursue is pointed out 2 Rolle Abr. 472, viz. to extend the remainder, which gives him a right to the rent reserved. These points arise generally in Courts of Equity in cases of conflicting incumbrancers. Now a Court of Law has not proper officers or powers to determine such questions. The statute therefore could not have intended to put trust estates and legal estates on the same foundation, but only to embrace

1819.

Don
against
HILDA.

(a) *Ante*, p. 710.

(b) 1 T. R. 2.

(c) 1 T. R. 156.

(d) 1 T. R. 772.

(e) 1 Ves. J. 431.

(f) 3 Atk. 200.

(g) 3 Atk. 739.

(h) 8 East, 467.

(i) 2 New Rep. 461.

the

1819.

Dox
against
Hunt.

the cases of estates in fee-simple, held in trust for the debtor in fee-simple. But there is another objection. Here the trustee was not trustee for *Richard Newman*, but for *Sarah Newman*, at the time when the writ of *elegit* was sued out, and so the case is not within the tenth section. On this point they cited *Ex parte Knott* (a), and *Wilkes v. Bodington*. (b)

Cur. adv. vult.

ABBOTT C. J. now delivered the opinion of the Court. This was an action of ejectment tried before my brother *Park* at the last assizes for the county of *Sussex*. The title of the lessor of the plaintiff was upon a judgment recovered in the year 1808, against *Richard Newman* for 8000*l.* and a writ of *elegit* and inquisition thereupon in the year 1818, finding *Richard Newman* seised in fee of the premises in question. It was further proved that the defendant occupied the land as a tenant, and had declared that he considered it to belong to *Richard Newman*, and had delivered to him a notice of the judgment received in *June* 1818 from the lessor of the plaintiff. On the part of the defendant, it was proved that on the 22d *June*, 1762, *Francis Hare Naylor* had conveyed the premises in question, *inter alia*, to *Thomas Carter*, for a term of 1000 years, by way of mortgage for securing the sum of 6000*l.* That in the year 1779, the mortgage was paid off, and deeds were then executed, whereby, in effect, the term was assigned to *William Denman* in trust for *John Newman*, a purchaser of the premises, and to attend the inheritance. That in the month of *October*, 1814, the said *Richard Newman*, to whom

(a) 11 *Ves.* 617.

(b) 2 *Vern.* 599.

the

the premises had descended from the purchaser *John Newman*, made a settlement upon his intended marriage, whereby he conveyed the premises to trustees and their heirs to the use of himself for life, with a remainder to his intended wife for life, remainder to the issue of the marriage, and reversion to himself in fee. That in the year 1816, the said *Richard Newman* and his wife conveyed their life estates, and his reversion in fee, to *Sarah Newman*, the mother of *Richard*, as a security for 1162*l.*; which appears to have been money then due from him to her. That *Mrs. Newman*, the mother, died in the year 1817, having previously devised her interest to some other relations. That *William Denman*, to whom the term had been assigned in trust, to attend the inheritance as aforesaid, died about four years ago; and that on the 19th *March* last, his son took out administration to him, and executed a deed, purporting to be an assignment of the term to a person therein named, in trust for the devisees of *Mrs. Newman*, the mother. Upon this evidence, two questions were made at the trial; whether the term might be presumed to have been surrendered and merged in the inheritance; and if it might not, then whether it was a trust within the 10th section of the Statute of Frauds, so as not to stand in the way of the execution on the judgment. The learned Judge thought this a case in which a Jury might presume a surrender of the term; and the matter being accordingly left to them, they found that the term had been surrendered. A motion was afterwards made for a non-suit, according to leave given by the learned Judge; a rule to shew cause was granted, and the matter argued before us very fully and ably. The same two points were made. And

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 Dox
 against
 HILDER.

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against
Hunt.

with respect to the Statute of Frauds, a further point also: it being contended, first, that the trust of a term of years is not within the 10th section of the statute; and secondly, that if it be, yet in this particular case, the statute would not help the plaintiff, because the termor must be considered as a trustee, not for the debtor, but for the devisees of Mrs. Newman at the time of issuing the execution. Upon these points, however, it is not necessary for us to pronounce any judgment, because we are of opinion, that in this case, a surrender of the term might lawfully and reasonably be presumed. It is obvious, that if such a surrender had been made, it would probably not be in the power of the plaintiff to produce it, he being a stranger to the particulars of the title which his debtor had in the land. The principal ground of objection to the presumption was, that such a presumption had, in no instance hitherto, been made against the owner of the inheritance; the former instances being, as it was said, all cases of presumption in favour of such owner. But this proposition appears to be too extensively laid down. One of the instances in which it has been said that a surrender shall be presumed, is the case of a mortgagor setting up a term against his own mortgagee, and this is said generally, and without distinction, between a mortgagee in fee or for years. But if such a term be set up against a mortgagee for years, and a surrender presumed, the presumption is made against, and not in favour of the owner of the inheritance. It is made against his interest at the time of the trial, but in favour of his honesty at the time of the mortgage; for if the term existed at the time of the mortgage, he ought in honesty to have secured the benefit of it to the

the mortgagee at that time, and not to have reserved it in his own power, as an instrument to defeat his mortgage. And upon the same principle on which a surrender is presumed in the case of mortgagor and mortgagee, we think it may reasonably be presumed in the present case; though the principle is applicable not to the judgment creditor, but to other persons. One of the general grounds of a presumption is, the existence of a state of things, which may most reasonably be accounted for, by supposing the matter presumed. Thus the long enjoyment of a right of way by *A.* to his house or close, over the land of *B.*, which is a prejudice to the land, may most reasonably be accounted for, by supposing a grant of such right by the owner of the land: and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for, by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed. Where a term of years becomes attendant upon the reversion and inheritance, either by operation of law, or by special declaration, upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor, and without supposing any surrender of the term; and therefore in general such enjoyment, though it may be of very long continuance, may possibly furnish no ground to presume a surrender of the term. But where acts are done or omitted by the owner of the inheritance, and persons dealing with

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against
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against
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him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made; in such cases the things done or omitted may most reasonably be accounted for, by supposing a surrender of the term; and therefore a surrender may be presumed. We think there are such things in the present case. In the year 1814, *Richard Newman* the debtor, and then owner of the inheritance, made a settlement upon his intended marriage, which took place immediately. Upon such an occasion the title and title-deeds of the husband would probably be looked into by professional men, on the part of the husband at least, if not on the part of the wife also: and notwithstanding the assertion of one of the learned gentlemen, who argued this case on the part of the defendant, and by whom we were informed that it is not usual, on such occasions, to take any notice of an outstanding satisfied term; we cannot forbear thinking that such a term always ought to be, and frequently is, in some way noticed, either by the deed of settlement, or by some separate instrument; because if it be not noticed, and the termor be not called upon to assign the term to the uses of the settlement, nor any declaration of trust made of it to those uses, it may afterwards be made an instrument of defeating the settlement. The title-deeds usually remain with the husband, and if he be driven by necessity to borrow money, he may meet with a lender who has no notice of the settlement, and may by handing over his deeds, and obtaining an assignment of the term to him, and other conveyances, give to him a title that must prevail both at law, and in courts of equity, against the settlement. The supposed practice of taking

no notice of outstanding terms on such an occasion appears to have been insisted upon before Lord *Hardwicke*, in the case of *Willoughby v. Willoughby*, as applied to marriage settlements and purchases. But that very learned judge, in giving his judgment in that case, says, he had enquired of a very learned and eminent conveyancer, and could not find that there had been any such general rule. And he afterwards proceeds to say, “Where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the case of a purchase or mortgage, where the title-deeds always are, or ought to be, taken in; for if he has the creation and assignment of the term in his own hands, no use can be made of it against him. Such instances as these may account for the practice in many cases, but cannot constitute a general rule.” If in the present case it had appeared, that the deeds relating to the term were delivered to the trustees of the marriage settlement, as one of the securities for the settlement, the case would have stood on a very different ground. The marriage settlement, however, is not the only occasion on which we think it may most reasonably be supposed, that this term, if existing, would have been brought forward. It appears that in 1816, the same *Richard Newman*, being then indebted to his mother, and desirous of giving her security for the debt, prevailed upon his wife to join with him in conveying to her the interests they derived under the settlement. Upon this occasion, an assignment of the term, or a delivery of the deeds relating to it, would undoubtedly have been most important acts in favour of the mortgagee, because they would have protected

1819.

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 against
 HILDER.

1810.

 Dec
 against
 Plaintiff

the mortgagee against any subsequent use of the term to defeat her mortgage. On both these occasions, therefore, the term, if existing, could not have been wholly disregarded, without either want of integrity on the part of *Richard Newman*, or want of care and caution on the part of the professional men engaged in those transactions. We think it more reasonable to presume a prior surrender of the term, than to presume such deficiencies. It certainly might not unreasonably be left to a jury to consider to what cause they would attribute these omissions; and this was done at the trial. It is true that an assignment of the term was taken a few days before the trial for the alleged benefit of the legatees of the mortgagee, *Mrs. Newman*, on whose behalf we were informed the present cause was defended. But this tardy act cannot be of any avail, and leads not to any presumption. The assignment was made by the administrator of the person in whom the term had been vested; and the administrator would probably be ignorant of any previous surrender made by the intestate. The time for dealing with the term, on behalf of the mortgagee, was the date of the mortgage. An actual assignment of the term is more regarded than its mere quiescent existence. It will defeat the title to dower, which its existence only will not, according to the case of *Maundrell v. Maundrell*, 7 *Ves. jun.* 567, and 10 *Ves. jun.* 246., and the cases there cited. These observations respecting the settlement and the mortgage, receive additional force from the consideration of their dates. They were both long subsequent to the judgment, and they are the acts of a person materially interested in protecting the land from the judgment, and excluding all questions on the subject

subject of priority or otherwise in the case of the settlement, for the sake of his intended wife, and the issue that he might expect by her, and in the case of the mortgage, for the sake of the mortgagee, to whom he was so nearly related, and who was evidently a favoured creditor. And it cannot be denied that an actual assignment of the term would have been in many respects more operative against the judgment, than its mere existence. In the case of the mortgage, it would have put an end to all question on the Statute of Frauds, by making the termor specifically a trustee for the mortgagee before execution issued, according to the case of *Hunt v. Coles*, 1 Com. Rep. 226. For these reasons we think the verdict ought not to be disturbed, and the rule must therefore be discharged.

Rule discharged.

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against
Hunt.

RAPP *against* LATHAM and PARRY.

Wednesday,
June 30th.

ACTION for money had and received. Plea, first, general issue, secondly, set-off. This action was brought by order of the Lord Chancellor against the defendants, who were bankrupts, and was defended by the assignees. The question was, whether

A. employed
B. and C., who
were partners
as wine and
spirit mer-
chants, to pur-
chase wine and
sell the same
upon commis-

sion. C. the managing partner, represented that he had made the purchases, and that he had sold a part of the wines so purchased at a profit; the proceeds of such supposed sales he paid to A., and rendered accounts, in which he stated the purchases to have been made at a certain rate per pipe. In fact, C. had neither bought nor sold any wine. The transactions were wholly fictitious, but B. was wholly ignorant of that. Upon the whole account a larger sum had been repaid to A., as the proceeds of that part of the wine alleged to be resold, than he had advanced; but the other part of the wine, which C. represented as having been purchased, was unaccounted for. Held that B. was liable for the false representations of his partner; and that A. was entitled to retain the money that had been paid to him upon these fictitious transactions, as if they were real.

Held also, the supposed purchases having been represented to have been made at a certain specified rate per pipe, that A. might maintain an action for money had and received to recover the specific sums advanced for the number of pipes of wine unaccounted for.

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Parry
against
Latham.

the plaintiff was entitled to prove any and what debt under the commission. The two defendants were in partnership as wine and spirit merchants. The business was under the sole direction and management of *Parry*; *Latham* being also an insurance broker. The plaintiff employed the defendants to purchase wine for him on commission, and to resell the same as opportunity might offer. The plaintiff advanced the money to pay for the wines, and the duties thereon. The defendant *Parry* represented to the plaintiff that wines were actually purchased and sold, and from time to time rendered in the name of *Latham* and *Parry* accounts of such sales, and paid the proceeds thereof to the plaintiff. These dealings commenced in January 1812. *Parry* then wrote to the plaintiff that he had an opportunity of purchasing 61 pipes of port at 65*l.* per pipe, and he desired the plaintiff to remit the money to pay the price of such wines and the duties thereon: the plaintiff did remit the money, and *Parry* represented that he made the purchase, and afterward, in the name of the firm, transmitted an account to the plaintiff, stating that 30 of these 61 pipes were resold at the price of 84*l.* per pipe, and paid the proceeds of such pretended sale to the plaintiff. The other transactions were similar to this, and continued from January 1812 to 1813; during that time *Parry* represented that eleven different purchases of wine had been made. Each transaction formed the subject of a separate account, and all the purchases were described as being made at a certain specified rate per pipe. The plaintiff conceived that *Parry* was in fact laying out his money in *bonâ fide* purchases of wines, and that he actually resold part of such wines as he represented;

But

But upon the bankruptcy taking place, it appeared that the transactions were wholly fictitious; and that *Parry* had had recourse to them as expedients to raise money. The defendant *Latham* knew that the plaintiff had employed *Parry* to buy and sell wines on commission, but he had no knowledge that the transactions were fictitious. Upon the whole account the plaintiff had advanced, on account of the alleged purchases of wine, and some other purchases of rum, about which there was no question, 126,000*l.*, and he had received, on account of the supposed resale of part of the wines and the profits thereon, 130,000*l.* He claimed to recover the money he had advanced for the purchase of that part of the wine which the defendant *Parry* had represented as purchased, and which they had never, in fact, delivered or resold. The cause was tried at the *London* Sittings after last *Hilary* term, before *Abbott* C. J., and it was contended by the plaintiff that he had a right to take each transaction separately, and to charge the defendants with the amount of the money advanced to them, for the purchase of every pipe of wine not accounted for.

The Lord Chief Justice was of opinion, that in this action for money had and received, the plaintiff could not recover, as the defendants had in fact received no money beyond what they had actually paid to the plaintiff, and the plaintiff was therefore nonsuited, with liberty to move to enter a verdict for such sum as an arbitrator should award, on a principle to be laid down by the Court. A rule nisi having been obtained for that purpose by *Scarlett* in *Easter* Term last, cause was shewn on a former day in this term by

Vaughan,

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against
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 against
 LATHAM.

Vaughan, Serjt. *Gurney* and *Littledale* for the defendants. If the defendant *Latham* had even been privy to the fraud of *Parry*, this action for money had and received is not maintainable, for it does not lie, unless money actually pass between the parties. If there be only money's worth, or if by mistake, or fraud, a man represent that he has received money, and it afterwards appear upon the evidence that money was not received, this is not the proper form of action. Now here no money has come into the hands of the defendants beyond what they have paid, and that being so, this action is not maintainable. Secondly, although it be true, that one partner is liable for the fraudulent acts of another, that rule must be confined to real transactions, for such only are in the ordinary course of trade, and are to be considered as partnership transactions. The principle upon which one partner has been held bound by the acts of another, is, that he gives that other an implied authority to bind him in all partnership transactions, and therefore it has been held, that if one partner be dissatisfied with the conduct of another, and give notice to the parties who are trusting that other not to trust him, he is not liable, *Willis v. Dyson*. (a) But here there is no partnership transaction. These fictitious purchases and sales are not in the ordinary course of trade, they are not therefore partnership transactions, with respect to which alone one partner has an implied authority to bind another. There is no instance in the books, where one partner has been held bound by the acts of another, where the transaction is not a real transaction. There are instances

(a) 1 *Starkie*, 164.

as to the accepting of bills, receiving goods or money; but these are all real transactions. Where a partner represents that he has bought and sold goods, and where it is only a transaction existing in his own mind, when planning a fraud, there is no authority which says that his partner is bound. (*Holroyd J.* Suppose there was only one transaction, viz. an advance of 5000*l.*, a return of money for wine re-sold at a profit of 2000*l.*, and that 7000*l.* were accordingly given in return for the 5000*l.* received as if it were a real transaction, and that *Latham* afterwards discovers it to be fictitious. *Latham* and *Parry* could not then treat it as a loan, and bring an action to recover back as much as the sum they had paid exceeded the money advanced to them with interest, and if they could not, then there was no debt due to *Latham* and *Parry*, and consequently no part of it could be applied to subsequent transactions.)

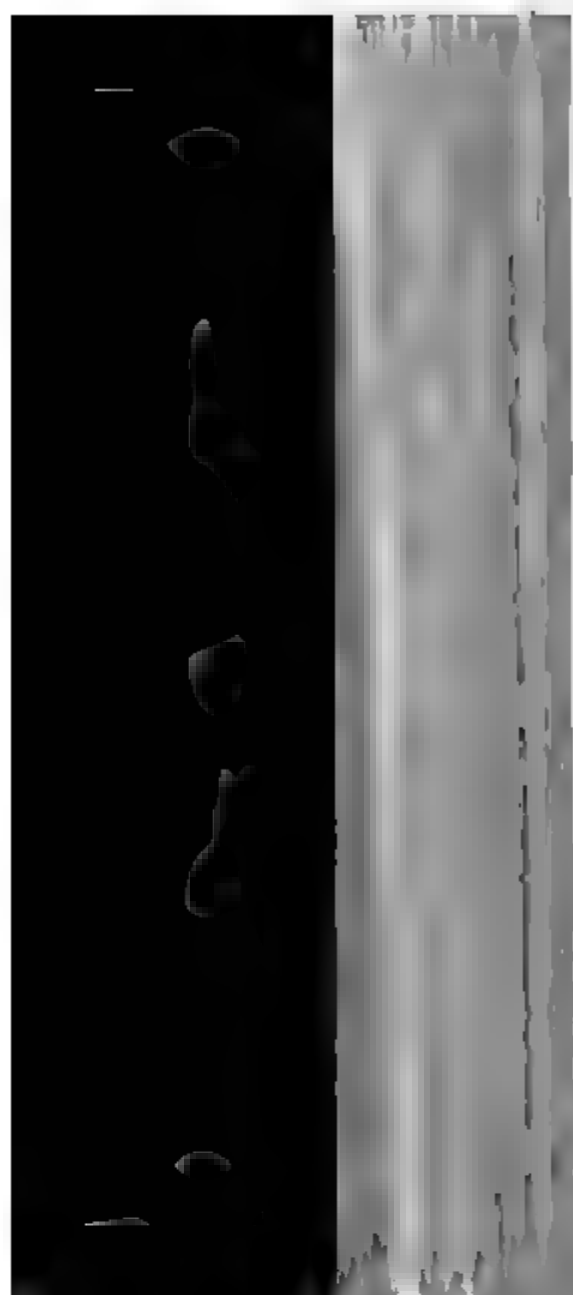
1819.

 RAPP
 against
 LATHAM.

Scarlett, *Marryat*, and *Tindal* contra. It is well established that an innocent partner is liable for the fraudulent acts of another. In *Willet v. Chambers* (a), there was a partnership between two conveyancers in the country, and money had been received partly by one and partly by the other, to be laid out upon a mortgage; the mortgage was forged by one of the partners without the knowledge of the other, still it was held that the innocent partner was liable to repay the money. In *Jacaud v. French* (b), the same principle was recognised; and in *Band v. Gibson and Jephson* (c), one of two

(a) *Cowper*, 814.(b) 12 *East*, 317.(c) 1 *Campb.* 185.

partners,



was made for the price of the g
any previous dealing between th
the defendant *Parry* has received
a certain number of pipes of wine
has purchased; he afterwards r
sold a part of these wines at a pr
ceeds of such sale to the plaintiff
account for the residue: the mor
as the price of the residue of the
and received to the plaintiff's use
a partnership transaction, *Latha*
of his partner; the plaintiff seeks
specifically paid by him to the d
specific wines, which they represen
for him, and which they had not.
therefore upon a consideration wh
is said that the defendants are en
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been made upon the sale of par
other words, they are entitled to
advances as a loan of money, as

at the end of one or even of five years, to refund the same, because the defendants, or one of them, had imposed upon him as to those profits. This indeed would be applying payments which had been made upon one account to another. These transactions are not to be considered as forming one account in the aggregate, for the defendants themselves have separated them, and have rendered an account of what was sold and what not; besides, it is not a purchase of a gross parcel of goods at a gross sum of money, but a purchase of a certain number of pipes of wines, at a specific price per pipe, and the plaintiff is entitled to recover the sum he had advanced for the price of every pipe of wine not actually purchased.

Cur. adv. vult.

ABBOTT C. J. Now delivered the judgment of the Court. This case has been so recently argued, that it is not now necessary to state the circumstances of it, and it will be sufficient to observe, that according to the accounts rendered to the plaintiff, the supposed purchases were all alleged to be made at certain specified rates *per pipe or hogshead*, so that each transaction, if real, was divisible in its own nature. Upon consideration of the case we are of opinion, that the defendant *Latham* is bound by the acts and representations of his partner *Parry*, and cannot be allowed to say that those transactions were fictitious, which *Parry* represented to be real, whether such representations applied to the sale of the whole number of casks supposed to have been purchased at one time, or to a part only of such number. The consequence of this will be, that the plaintiff is entitled to retain, without account,

all

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against
LATHAM.

1819.

Ray
against
Larman.

all the money that has been paid to him upon these fictitious transactions, as he would have been if the transactions had been real, and is entitled to recover back the sums advanced for the other supposed purchases, as money advanced by him upon a consideration not performed, and as therefore had and received by the defendants to his use. The nonsuit therefore must be set aside, and a verdict entered for the plaintiff, for the sum which shall be found due upon the principle which I have mentioned, which is the mode most favourable for the plaintiff.

Rule absolute.

Tuesday,
June 15th.

WINTER *against* MOUSELEY.

A bond was conditioned for the payment of a sum of money to executors of the obligor, and of the interest during his life, payable on certain days, or within twenty days after demand. The obligee became bankrupt and interest was then due, but no demand had been made.

Held, there having been no forfeiture, that the bond did not constitute a debt prove-

able under the commission. Held, secondly, that it was not proveable as an annuity bond within the meaning of 49 G. 3. c. 121. s. 17.

DECLARATION on a bond for 2000*l.*, dated 29th September, 1814, the condition of which, after reciting certain transactions between plaintiff and defendant, stated, that if defendant should pay to plaintiff yearly, during his life, 40*l.*, being the interest on the principal at 4*l.* per cent., by half-yearly payments, on Lady-day and Michaelmas, or within twenty days next after demand; and should also pay the principal sum of 1000*l.* within twelve months after the decease of the plaintiff, to his executors or administrators, together with all interest then due for the same, then the writing obligatory to be void. Declaration then assigned as a breach of the condition, the non-payment of a year and a half's interest and alleged that a demand had been made,

and

and twenty days elapsed, by reason whereof the bond became forfeited. Plea that after the bond became forfeited, as in the declaration mentioned, and before the commencement of this suit, to wit, on the 10th of *July*, 1818, the defendant became a bankrupt, and *that the said debt accrued due and was payable to the plaintiff before the defendant became a bankrupt*, and upon that plea issue was joined. At the trial before *Garrow B.* at the *Stafford Spring Assizes*, 1819, it appeared that the interest was all due on the 25th *March*, 1817, that the commission was dated the 6th *May* in that year, and that the defendant obtained his certificate on the 23d *April*, 1818. But the defendant was unable to shew that any demand for payment was made upon him previously to his bankruptcy. It was contended that this bond had become forfeited before the bankruptcy, and was a debt proveable under the commission, and therefore barred by the certificate; and secondly, that it was an annuity bond, and therefore proveable under 49 G. 3. c. 121. s. 17. The learned judge overruled both these objections, and the jury, by his directions, found a verdict for the plaintiff. A rule nisi for a new trial having been obtained by *Jervis* in last *Easter* term, upon the objections taken at the trial,

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 Writen
against
Mousely.

W. E. Taunton now shewed cause. This case is distinguishable from *Ex parte Rowlatt* (a), on the ground that there there had been a forfeiture of the bond previously to the bankruptcy, which there has not been here, no demand for the payment of the interest having been proved. But in *Ex parte Barker* (b), where no forfeiture had taken place, it was held not to be proveable. The

(a) 2 *Ross*, 416.(b) 9 *Ves. jun.* 110.

had

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 against
 MOUSSELET.

same distinction is taken between the cases *Ex parte Groom* (a), where the proof was rejected, and *Ex parte Winchester* (b), where it was admitted. The rule is, that unless there has been a forfeiture of the bond it is not proveable. As to the other point, this is not an annuity bond within 49 G. 3. c. 121. s. 17. For the principal here never was put in hazard; on the contrary, it is to be repaid to the plaintiff's executors within a certain time after his death, and interest is to be paid till that time. An annuity is a certain sum, which is periodically payable in satisfaction of the debt and demand; but here the debt is kept alive, notwithstanding the annual payment.

Jervis contra. Contended first that this fell within the rule laid down in *Ex parte Rowlatt*, the failure to pay interest having occurred before the bankruptcy; but secondly, that it might have been proved under 49 G. 3. c. 121. s. 17., which entitles any annuity creditor to prove *whether there be any arrears at the time of the bankruptcy or not.* Now an annuity, strictly speaking, is an annual payment, and the annual payment in *Ex parte Rowlatt*, which exceeded 5 per cent., is considered by the Court as an annuity. This bond, therefore, was proveable under the commission, either on the ground that there was a breach of one of the conditions, or on the ground that it was an annuity.

ABBOTT J. I am of opinion that this bond was not proveable under the commission. In many of its circumstances this case is very like *Ex parte Rowlatt*; but it differs in the very point which was the very foundation of the

(a) 1 Atk. 115.

(b) 1 Atk. 116.

judgment;

judgment; which was that the breach of the condition gave a right to the obligee to put the bond in suit. Here there was no forfeiture of the bond, and therefore the obligee had no right to put the bond in suit, and consequently had no right to prove his debt under the commission. It has been argued, however, that this is an annuity-bond, and that it comes within the 49 G. 3. c. 121. s. 17., which entitles the annuity creditor of any bankrupt to prove under the commission for the value of such annuity, which value the commissioners are to ascertain. Certainly this is merely a stipulation for the payment of interest for the forbearance of a certain sum of money. It is not an annuity in any reasonable sense of the term, nor does it come within that meaning in the act of parliament.

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BAYLEY J. It is an abuse of terms to call this an annuity bond. It is a bond to pay the principal sum with interest in the mean time ; *Ex parte Rowlatt* is a strong authority against the defendant, for the very ground of the judgment there was that the bond was forfeited, and I think, under the authority of that case, that the plaintiff would not be at liberty to prove the debt under the commission.

HOLROYD J. There was no forfeiture of this bond before the bankruptcy, and therefore it is not proveable under the commission, unless it comes within the 49 G. 3. c. 121. s. 17., which enables the annuity creditor of any bankrupt to prove his debt, for the value of such annuity, which is to be ascertained by the commissioners. Although this may be an annuity in one

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WINTAS
against
MOUSELEY.

sense of the word, I am of opinion that it is not an annuity within the meaning of the act of parliament.

BEST J. If this be an annuity it would fall within the annuity act, and require to be enrolled, and every bond for the payment of principal and interest would be subject to the provisions of that statute, every such bond provides for an annual payment of interest, and, according to the argument, that alone would constitute an annuity. I have, however, always understood the meaning of an annuity to be where the principal is gone for ever, and it is satisfied by periodical payments. On the other point, I am also of opinion that this bond, not having been forfeited, was enforceable under the commission, and consequently the defendant's certificate is no bar to this action.

Rule discharged.

Wednesday,
June 30th.

The KING against COLERIDGE, and Others

The mode of burying the dead is a matter of ecclesiastical cognizance, and therefore where the question was, Whether a parishioner had a right to be buried in the parish church-yard in an iron coffin, which was a new and unusual mode,

A RULE nisi had been obtained for a mandamus to the rector, officiating curate, churchwardens, sexton of the parish of *Saint Andrew, Holborn*, commanding them to bury, or to do every act necessary to be done, in order to the burial in the churchyard of that parish, of the corpse of *M. G.* deceased, the wife of *A. G.* a parishioner of the said parish. It appeared from the affidavits that the corpse had refused interment, on account of its being inclosed in an iron coffin, the Court refused a mandamus.

an iron coffin, it being expressly intimated, that it would be interred if brought in the usual way, in a wooden coffin. The number of the inhabitants of the parish was 30,000, and the burials were 700 annually.

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COLERIDGE
and others.

Gurney and Campbell now shewed cause. It is sworn that the usual mode in this parish is to bury in wooden coffins, and if this new mode prevail it is clear, from the statement of numbers annually buried, that the church-yard would, in a short time, be filled. Admitting that at common law there is a right of interment, still the usage which confirmed the right, as also prescribed the mode of exercising it, *Andrews v. Carwithorne* (a). Besides the mode of burial, is a matter purely of ecclesiastical cognizance, and it is well known that in such cases this Court will not interfere. *Rex v. Churchwardens of St. Peters, Thetford*, (b), *Rex v. Taylor* (c). Here there has been no absolute refusal to bury, but only to bury in a particular mode. Besides, how far is the claim to go, for a party might claim as a right to bury in an iron coffin of any dimensions.

Scarlett and Chitty contra. By common law the inhabitants of the parish have a right to be buried in the churchyard, and no particular mode of burial is prescribed, *Degges Parsons' Law*, pt. 1. c. 12. *Burn's Eccl. L.*, tit. *Burial*, 258. *Comyn's Dig.* tit. *Cemetery*, B. *Dean and Chapter of Exeter's Case*. (d) The case of *Rex v. Bishop of Exeter* (e) is in point. There this Court granted a mandamus, to compel him to give the

(a) *Willes*, 536.(b) 5 *T. R.* 364.(c) 1 *Burn Eccl. L.* 258. *Ed.* 1809.(d) 1 *Salk*, 334.(e) *Palm.* 51.

1819.

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**The King
 against
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 and others.**

chrisem to baptize the parishioners' children, although in that case the archbishop might have been appealed to. And in *Rex v. Dean and Chapter of Trinity Chapel, Dublin* (a), the same law is laid down; yet in both these cases it might have been urged they were matters of ecclesiastical jurisdiction. This writ of mandamus is in fact in aid of the ecclesiastical court, being in the nature of a bill for a specific performance, to compel the act to be done, which no other court can do. For the bishop can only punish and censure, whereas this Court may command the thing to be done, and so remove an indecent exposure of the dead body. The truth is that this is only resisted in order to obtain a larger fee. But burial cannot be denied on that account, *Rex v. The Lord of the Manor of Hendon* (b), and *Littlewood v. Williams*. (c)

ABBOTT C. J. I am of opinion that in this particular case the Court cannot interpose by granting a mandamus. It may be admitted for the purpose of the present question, that the right of sepulture is a common law right; but I am of opinion that the mode of burial is a subject of ecclesiastical cognizance alone. If a clergyman should absolutely refuse to bury the body of a dead person, brought for interment *in the usual way*, I am by no means prepared to say that this Court would not grant a mandamus to compel him to inter the body. But in so doing we should be acting in aid of the ecclesiastical court, for that court would compel the burial, although not in so speedy a manner as by mandamus. In this case there has been no refusal to inter the body

(a) 8 Mod. 28.

(b) 2 T. R. 484.

(c) 6 Taunt. 281.

in the usual and ordinary mode; the contest between the parties is, whether the officers of the parish shall be compelled to bury the body in an unusual and extraordinary manner. I am of opinion that that is a question proper for the decision of the ecclesiastical court and not of this Court. I need not say that in matters purely of ecclesiastical cognizance, this Court does not interfere, as for instance in the case cited from *5 T. R.*, the Court will not grant a mandamus to make a church-rate. I am therefore of opinion that this rule should be discharged with costs.

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and others.

BAYLEY J. I agree entirely with my Lord C. J. in the judgment which he has delivered. The object of this application is to compel a burial in a specific manner. It is not for this Court to say that there shall be a particular mode of burial, but that is a matter purely for the consideration of the ecclesiastical court.

HOLROYD J. I am also of the same opinion. The matter in dispute is merely as to the mode of burial, and that I think is purely of ecclesiastical cognizance. In *3 Inst.* 203. it is said, "that in every sepulchre, that hath a monument, two things are to be considered, viz. the monument and the sepulture or burial of the dead. The burial of the *cadaver*, (that is *caro data vermibus*), is *nullius in bonis*, and belongs to ecclesiastical cognizance, but as to the monument, action is given (as hath been said), at the common law for defacing thereof." It seems to me that the mode of burial is as much a matter of ecclesiastical cognizance, as the prayers that are to be read, or the ceremonies that are to be used at

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against
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the funeral. I therefore think that this rule should be discharged.

BEST J. It seems to me that this a matter purely for the ecclesiastical court, and that of itself is a sufficient reason why this mandamus should not be granted. But considering this as an application to the discretion of the Court, I think that this mandamus ought not to go. The consequence of enforcing such a mode of burial would produce great public inconvenience. For it is evident that in a few years the church-yard would be filled, and a great additional expense cast upon the parish in providing other places for the burial of the parishioners. I think, therefore, that this Court should not interfere in the exercise of its discretion, to enforce a mode of burial calculated to produce such consequences.

Rule discharged with costs.

MEYRICK and Others *against* WHISHAW and Others.

A. by marriage
settlement,
conveyed cer-
tain estates to
trustees with
remainder to
his children
of the mar-

FRANCIS Whishaw being seized in fee of certain estates by his marriage-settlement conveyed them to trustees to the use of himself for life, remainder to trustees to preserve contingent remainders; remainder for securing certain payments to his wife, and subject thereto, share and share alike, as tenants in common; and for default of such issue and if any of such children, there being more than one, shall happen to die without issue before twenty-one, that in every such case, the share of such child, should go to the survivors, as tenants in common; and in case all such children should die without issue, then to the use of the settlor in fee. Held, that there were no cross-remainders between the children of the marriage, except in the case of a child having died without issue, and under twenty-one. And that one of the children having died without issue, but after twenty-one, that his share vested in the settlor, and not in the survivor.

to

to the use of all and every of the children of the said *Whishaw* on the body of his intended wife to be begotten, sons as well as daughters, and the heirs of their several respective body and bodies to be begotten equally, share and share alike, as tenants in common, and not as joint tenants, with remainder over, in the words following, "And for default of such issue, and if any of such children, there being more than one, shall happen to die without issue of his or their bodies or body, before he, she, or they shall attain the full age of twenty-one years, that then and in every such case, the part and share, parts and shares of every such child and children so dying, shall go and remain, and be to the survivors and survivor of such children, and the heirs of the bodies and body of such survivors and survivor as tenants in common, and not as joint tenants, and in case all such children should die without issue of his, her, or their body or bodies, then to the use of the said *Francis Whishaw* his heirs and assigns for ever." The marriage took effect, and the issue were two children, *Luke* and *Mary Anne*. *Luke* after attaining twenty-one years, died without issue, and in the life-time of his father. *Mary Anne*, who survived *Luke*, intermarried with *William Meyrick*, and also died in the life-time of her father, leaving the plaintiffs her only children. *Francis Whishaw* died in *November* 1816, and by a codicil to his will, after reciting that upon the death of his son *Luke Whishaw* without issue, after having obtained the age of twenty-one years, he the said *Francis Whishaw* conceived himself to have become entitled to the reversion in fee simple of and in one moiety of the premises comprised in the said indentures of settlement, devised the said

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and others.

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and others
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and others.*

moiety to trustees, to certain uses therein mentioned, under which the several defendants were variously interested. The question, directed by the Vice Chancellor for the opinion of this Court, was, Whether under the limitations of the marriage-settlement the said *Mary Anne Meyrick* (the late mother of the plaintiffs) upon the death of the said *Luke Whishaw* took any and what estate in the moiety of the freehold premises comprised in the settlement to which the said *Luke Whishaw*, as the other of the two children of *Francis Whishaw* and *Anne* his wife, who attained the age of 21 years was entitled to at the time of his death, under the limitations of the same indentures. The case was argued at the sittings at *Serjeants Inn* before last *Hilary Term*, by

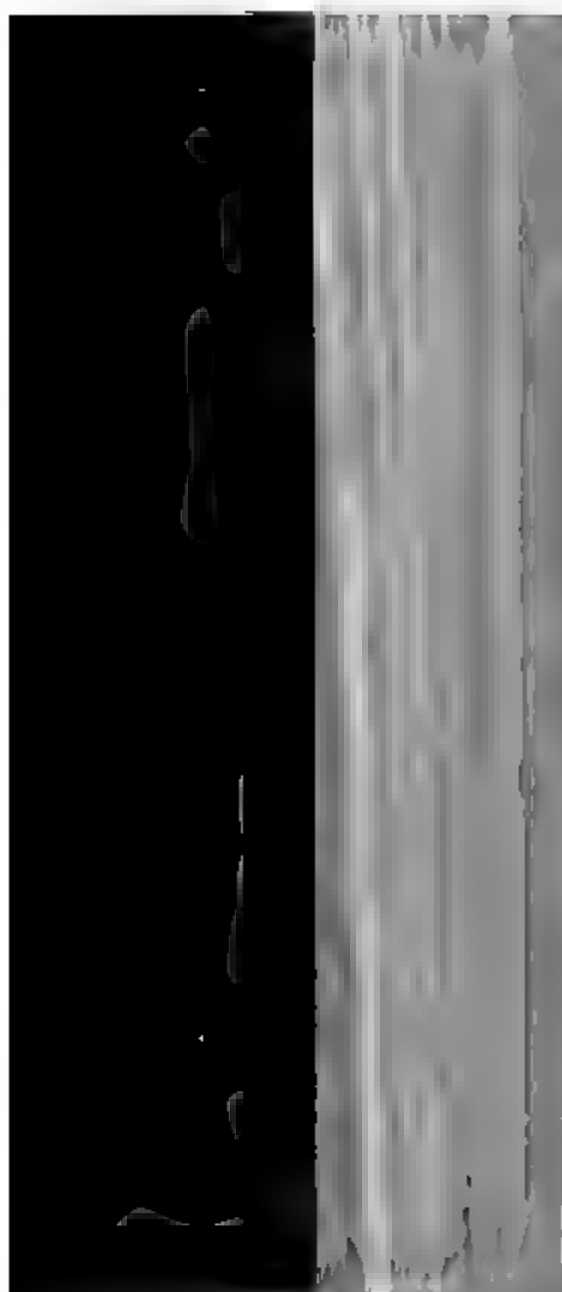
Walton for the plaintiff. By this deed cross-remainders are created amongst the children of the marriage, in the event of any of them dying at any age without issue, and consequently *Mary Anne Meyrick*, upon the death of *Luke Whishaw*, took a fee-tail in his moiety of the premises. No precise form of words is necessary to create cross-remainders; it is sufficient if that intention appear on the face of the deed. *Doe v. Wainwright* (a). Here such an intention clearly appears, for by the express terms of the deed the ultimate remainder to the settlor was to take effect only in case all the children of the marriage should die without issue. By the construction to be contended for on the other side, if any of the children of the marriage die after the age of twenty-one years, with or without issue, the ul-

(a) 5 T R. 431.

timate remainder is to take effect as to that child's share. That, however, is wholly inconsistent with the intention of the settlor, as declared in the ultimate limitation, which is in these words: "And in case all such children should die without issue of his, her, or their body or bodies, then to the use of the said *Francis Whishaw*, his heirs and assigns," without any reference to the time of death of such children, whether under or above the age of twenty-one years. It is true, that in the case of a deed like the present, there must be express words of inheritance to create cross-remainders in tail; although it would be otherwise in a will if the intention were clear. In this deed, however, there are such express words of inheritance; the settlor after limiting estates in tail to all and every the children of the marriage respectively, as tenants in common, limits the remainders over thus: "And for default of such issue, and if any such children, there being more than one, shall happen to die without issue before twenty-one, then and in every such case the part or share of the child so dying shall go and remain to the survivor and survivors of such children, and the heirs of their bodies as tenants in common." The words "for default of such issue clearly relate to any failure of such issue" whether partial or total. The preceding estates in tail limited to all and every the children, in case of there being more than one child, are distinct estates in tail to each child; and the words "default of issue" relate to any default of issue in any of the before limited estates. This is the case that has happened; one of the children has died without issue; the cross-remainders limited with words of inheritance are subsequent to those words; and this is one of the cases in which

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dying under age and without issue, according to this construction, in the words "for default of such issue;" it is intimated that as the case most likely is, the previously used words comprehend the issue. The instance put thus may be construed so as to control the general words. The construction of the plaintiff only assumes a redundancy, and does not contradict any part of the limitation, which confines the cross-remainders to the issue, under age and without issue, contradiction, as well as the words "for default of such issue," preceding the limitation of cross-remainders, are doubtful the intention should be construed by the rule of construction that a deed is to be construed strongly against the grantor, *5 Abr. tit. Grant, 393*. It would be a reason for a moiety of the estate to the surviving child in the case that if the first child was born the whole estate to that child, subject to be divested if

twenty-one makes no difference as to the intention in this case. If there had been only one child born, that child would have taken the whole. If this had been the case of a will there could have been no doubt, *Green v. Stephens*. (a) The words of this settlement are however comprehensive, and apt enough to execute the intention and to pass the estate of the deceased's son to the mother of the plaintiff by way of cross-remainder, under the words "for default of such issue," used prior to the limitation of the cross-remainders. A narrower construction will defeat the intention, and deprive the plaintiffs of their inheritance.

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Sugden contra. It is a well established rule, that cross-remainders, are not to be raised by implication in a deed. *Nevell v. Nevell* (b), and *Cole v. Levingston* (c). In *Doe v. Wainewright*. (d) Lord *Kenyon* states, that the deed contained express limitations by way of cross-remainders. Here there are no words expressly creating general cross-remainders. *Doe v. Dorvell* (e) is a clear authority applicable to this very case. There a grandfather, after the marriage of his son *B.*, who had two children then living, conveyed lands to trustees to the use of himself for life, remainder to *B.* for life; remainder to trustees, &c., remainder to the use of such child or children of *B.*, and in such shares, &c. as *B.* should appoint, and in default of such appointment, "to the use of all and every the children of *B.* and the heirs of their several and respective bodies as tenants in common, but if only one such child, to the

(a) 17 Ves. 74.
(d) 5 T. R. 427.

(b) 1 Roll. Abr. 837.
(e) 5 T. R. 518.

(c) 1 Ventris. 224.

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use of such only child and the heirs of his or her body;" remainder to the right heirs of *A.* in fee. Then *A.* conveyed the reversion in fee to *C.* Afterwards *B.* had other children and died without appointing. Held that *B.*'s children took vested interests in tail, and that upon the death of each child without issue, his share fell into the reversion conveyed to *C.* In *Doe v. Worsley* (a), the limitation was to all and every the daughter and daughters to be begotten, share and share alike, equally to be divided between them, and the heirs of the body or bodies of all and every such daughter and daughters, and for default of such issue to the right heirs, it was held that there were no cross-remainders between the daughters and their issue, and Lord *Kenyon* in that case regrets that the rule of construction applicable to deeds, that cross-remainders could not be raised by implication, did not also take effect in the case of wills. The intention of the settlor here is in favour of this construction; if a child died before he could bar the entail, his share is to go to the other children; but if he died after he could bar the entail, and did not settle it on them, his share was to revert to the father. The gifts over to the children and the father are mixed up together; the words "for default of such issue," apply to the father, and the subsequent words to the children; but there is no gift over to the children, except as to the share of a child dying before he attain the age of twenty-one years. Then again the words "in case all such children shall die without issue," apply to the father, and give him the shares which may have survived to any of the children; upon

(a) 1 *East*, 416.

their deaths without issue. It is a general rule that full effect should be given to all the words contained in a deed. Now by the construction contended for, the words "before he or they shall attain the age of twenty-one years," must be struck out.

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Cur. adv. vult.

The following certificate was afterwards sent.

This case has been argued before us by counsel. We have considered it, and are of opinion that under the limitations of this settlement, the said *Mary Anne Meyrick*, upon the death of the said *Luke Whishaw* took no estate in the moiety of the freehold premises to which the said *Luke Whishaw* was entitled at the time of his death.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

REGULA GENERALIS.

Trinity Term, 59th Geo. III.

It is ordered, that from and after the last day of this term, every notice for justifying bail in person shall be served before eleven o'clock in the forenoon of the day on which according to the present practice such notice ought to be served; except in case of an order of the Court for further time, in which case it shall be sufficient to serve the notice before three o'clock in the afternoon of the day on which such order shall be granted; and in all the cases aforesaid, the affidavit of service shall specify the time of day at which such notice shall have been served.

By the Court.

END OF TRINITY TERM.

AN
INDEX
TO THE
PRINCIPAL MATTERS.

ACTION ON THE CASE,
See CARRIER; SHIP, 1.

In a public navigable river, 20 years' possession of the water at a given level, &c. is not conclusive as to the right. *Vooght v. Winch*, T. 59 G. 3. Page 662

ADMITTANCE,
See COPYHOLD, 2.

ANNUITY,
See BANKRUPTCY, 9.

The deeds, and other assurances, a memorial of which is required by 17 G. 3. c. 26. to be enrolled, are those to which the grantor of the annuity is a party, or which are entered into by a third person at his instance and request, or on his behalf; and, consequently, where a third person, wholly unconnected with the grantor, guaranteed, in consideration of a certain commission, the payment of an annuity to the grantee: Held that such guarantee need not be enrolled. *Sandilands v. Marsh*, T. 59 G. 3. 673

ARBITRATION,
See PRACTICE, 10.

ARBITRATOR,
See AWARD, 2, 4.

APPOINTMENT, POWER OF,
See BANKRUPTCY, 1.

ATTACHMENT,
See ESCAPE.

ATTAINDER,
See PLEADING, 3.
TRANSPORTATION, 1.

ATTORNEY,
See PRACTICE, 12. 30.

APPEAL.

1. Where a statute gives a party aggrieved a right of appeal, on giving security to a specified amount, he may enter and respite his appeal at the next sessions, after having given such security, without notice to the other side; but after the appeal has been respited, if he does not give the usual notice of trying it, the sessions will be authorized to dismiss it altogether. *The King v. The Justices of Salop*, T. 59 G. 3. Page 694

ASSUMPSIT,
See PARTNERSHIP, 3; *VENDOR and VENDEE.*

1. One of the makers of a joint and several promissory-note, after the same

same had become due, gave his bond to the holder for the amount; but before the commencement of the action no money was actually paid on the bond: Held that, until he had paid money upon the bond, he could not maintain an action for money paid, in order to recover contribution against any of the other makers of the original note. *Maxwell v. Jameson*, M. 59 G. 3.

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2. Where a sheriff claimed as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law: Held that the latter might maintain money had and received for the excess paid above the legal fee, or might set off the same in an action by the sheriff against him. *Dew v. Parsons*, E. 59 G. 3. 562

ATTACHMENT,

See ESCAPE.

AWARD.

1. Where the parties named two arbitrators, who were to choose an umpire, and each arbitrator named a person to whom the other objected; and they afterwards agreed to decide by lot which should name the umpire, and thereupon the party who won named the person to whom the other had previously objected: Held that the award made by such umpire was bad. *Wells v. Cooke*, M. 59 G. 3. 218
2. The authority of an arbitrator is determined by the death of either party before the award. *Cooper v. Johnson*, H. 59 G. 3. 394
3. By rule of Court, a cause and all matters in difference were referred to an arbitrator, and the costs of the cause were to abide the event. The arbitrator directed the ver-

BAIL-BOND.

dict to be entered for the plaintiffs; but that they should not take out execution *for the debt* until they had paid a larger sum due to the defendant: Held that the plaintiff's attorney might still take out execution *for the costs*. *The Highgate Archway Company v. Nash*, E. 59 G. 3. Page 597

4. An arbitrator is not bound by a rule of practice, adopted by courts of law for general convenience; and, therefore, where on a reference of a Chancery suit, and all matters in difference between the parties, the arbitrator had allowed interest, (when it would not be allowed by a court of law or equity,) the Court refused to set aside the award on that ground. *In Re Badger*, T. 59 G. 3. 691
5. Where it was stipulated that in case of the breach of an agreement, the sum of 100*l.* should be received as a stipulated debt binding on each party, as to the amount; and an action for damages generally, for the breach of this agreement, was referred to an arbitrator, who awarded only 10*l.* damages: Held, that in order to entitle the party to come to set aside this award, it was necessary expressly to state in the affidavit, that this clause was pointed out to the arbitrator at the time, and that he was required to act upon it. *Pinkerton v. Caslon*, T. 59 G. 3. 704

BAIL-BOND.

See PRACTICE, 3, 18.

The assignee of a bail-bond, without any sufficient reason for so doing, brought separate actions against each of the bail: the Court, upon payment of the costs of one action only, stayed the proceedings in all. *Dissentiente Abbott C. J.* *Key v. Hill*, E. 59 G. 3. 598

BANK.

BANKRUPTCY.

See *BILLS OF EXCHANGE*, 5.

1. A trader being seised of an estate for life, with the general power of appointment, with remainder, in default of appointment, to himself in fee; after having committed an act of bankruptcy, upon which he was afterwards declared a bankrupt, executes his appointment in favour of an appointee: Held that all his interest having passed to the assignees by the assignment, that such appointment was void; and, therefore, that his assignee under the commission had a sufficient legal estate to maintain an ejectment. *Doe, Dem. Coleman, v. Britain*, M. 59 G. 3. Page 93
2. A. and B., owners of a ship, executed an absolute bill of sale to C. and D. for a nominal consideration. There was a parol agreement between them that C. and D. should accept bills for the accommodation of A. and B.; that the ship should be a security to C. and D. for any advances they should make on such acceptances, and that until default made by A. and B. in providing for the acceptances, the ship should remain in their possession and management. The ship was registered in the names of C. and D.; but A. and B. remained in the possession and management of her, appeared to the world as owners, and obtained credit from appearing so. Before default made by A. and B. in providing for the acceptances, C. and D. became bankrupts, and their assignees immediately seized and sold the ship. A. and B. afterwards became bankrupts: Held that trover for the ship could not be maintained by their assignees against the assignees of C. and D., for the parol agreement could not be set up against the bill of sale,

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and the case did not come within the statute of *James*, the ship having been seized by the defendants before the bankruptcy of A. and B.; and though the bill of sale, unaccompanied by possession, might be void as against creditors, it was binding upon A. and B. and their assignees. *Robinson v. M'Donnell*, M. 59 G. 3. P. 134

3. The 21 Jac. 1. c. 19. s. 11. is not repealed as to shipping by the ship-register acts; and therefore when A., the owner of a ship, duly assigned his interest in it to B., and B. became the registered owner, but by his permission A. continued to have the same in his possession, order, and disposition, until he became bankrupt: Held that the property in the ship passed to A.'s assignees under the statute of *James*. *Hay v. Fairbairn*, M. 59 G. 3. 193
4. Commissioners of bankrupt are authorized to examine a witness concerning the person, trade, dealings, estate, and effects, of the bankrupt, and incidentally to this power they may examine him also respecting other individuals, through whom they may be likely to obtain information on those points. And, therefore, where a witness was asked questions as to when and where he last saw the bankrupt's wife: Held that such questions were legal and material; and that the commissioners were justified in committing him for giving unsatisfactory answers to these questions. Held also, that the true criterion by which to judge as to the propriety of the commitment, was to consider all the questions and answers collectively, and then to say whether the whole examination was satisfactory or not; and, therefore, where the commissioners in their warrant set out several questions, to some of

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which,

to the principal sum due on a bill of exchange, so as to constitute a good petitioning creditor's debt, unless interest be specially made payable on the face of the bill. *Cameron v. Smith*, H. 59 G. 3. 305

6. A person having three bills of exchange, applied to a country banker, with whom he had had no previous dealings, to give for them a bill on *London* of the same amount, and the bill given by the banker was afterwards dishonoured: Held that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange.

Held, also, that if the exchange had not been complete, still that the banker having become a bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy, within the statute of *James*. *Hornblower v. Proud*, H. 59 G. 3. 327

7. Where the sheriff took possession under a *fieri facias*, and at a later hour of the same day, the defendant surrendered in discharge of his bail, and afterwards lay in prison two months, and thereby

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BILL
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1. The v
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be accepted. The bankers afterwards discounted a bill, and transmitted the same for acceptance to the vendee, who detained it in his possession for ten days, and then informed the bankers that he could not accept the bill, as the invoice of the goods had not been delivered; and after a further interval of sixteen days, the bankers having made no objection to his detaining the bill, returned the same; the vendor having then stopped payment, without delivering the goods or sending the carrier's receipt: Held that the drawee of the bill was not liable as acceptor.

Quære, Whether in any case the mere detention of a bill, for an unreasonable time, by the drawee, with whom it is left for acceptance, in point of law amounts to an acceptance. *Mason v. Barff*, M. 59 G. 3. Page 26

2. Where the drawer of a bill wrote to the drawee, stating that he had valued on him for the amount, and added, "which please to honour;" to which the drawee answered, "the bill shall have attention:" Held that these words were ambiguous, and did not amount to an acceptance of the bill, inasmuch as although an acceptance may be made by a letter to a drawer, still that can only be so where the terms of the letter do not admit of doubt. *Rees v. Warwick*, M. 59 G. 3. 113

3. The declaration stated that a bill of exchange was drawn and accepted at *Dublin*, viz. at *Westminster*, for a certain sum therein mentioned, without alleging it to be at *Dublin* in *Ireland*: Held that the bill upon this declaration must be taken to have been drawn in *England* for *English* money; and therefore proof of a bill drawn at *Dublin* in *Ireland* for the same

sum in *Irish* money, which differs in value from *English* money, did not support the declaration, and that this was a fatal variance.

Held, also, the bill having been drawn for a certain sum *sterling*, that the omission of the word *sterling* in the declaration was immaterial. *Kearney v. King*, H. 59 G. 3. Page 301

4. A person having three bills of exchange, applied to a country banker, with whom he had had no previous dealings, to give for them a bill on *London* of the same amount, and the bill given by the banker was afterwards dishonoured: Held that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange.

Held, also, that if the exchange had not been complete, still that the banker having become a bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy, within the statute of *James*. *Hornblower v. Proud*, H. 59 G. 3. 327

5. Where the defendant, being indebted to the plaintiff, paid to him the debt in *country* bank notes on a *Friday*, several hours before the post went out, and the plaintiff transmitted them partly by *Sunday* night's post and partly by a coach on *Saturday*, and both parts arrived in *London* on *Monday*, and were presented for payment and dishonoured on the *Tuesday*: Held that the true rule is, that a party, in order to avoid laches, must give notice by the *next day's* post, and not by the next possible post; and that the plaintiff, in so transmitting these notes, had been guilty of no laches, and might consider them as no payment, and re-

the other party: Held that he cannot maintain an action against the acceptor of this substituted bill. *Chapman v. Black*, E. 59 G. 3.

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7. To entitle the indorsee of an inland bill of exchange to recover interest from the drawer, it is not necessary to protest the same for non-payment. *Windle v. Andrews*, T. 59 G. 3.

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BOND.

1. A bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor; one of the partners dies, and a new partner is taken into the firm; at that time a considerable balance is due from the obligor to the firm; advances are afterwards made by the bankers, and payments made to them on account by the obligor; the latter is credited by the new firm with the several payments, and charged with the original debt and subsequent advances as constituting items in one entire account, and the balance due at the time of the partner's death is con-

in different than sufficient debt due at time of the partner, the considered Quære, What balance due the account assent, did operate as v. *Purchas*,

2. A bond, taken by C under the 4 not, therefore The office of act of part office; and bond, after ment of H under the for the due of the rates thereafter, i collection year was a condition o. And although condition of and G. P. collectors, bond, being by H. W. i

CHARITABLE USE.

BRIDGE,

See HIGHWAY, 1.

BROKER,

See FACTOR, 1.

BURIAL,

See MANDAMUS, 3.

CANAL.

A canal act directed, that no boat navigating therein, which should not be capable of carrying a greater burden than twenty tons, or which should not have a loading of twenty tons on board, should be allowed to pass through the locks, unless on payment of tonnage equal to a boat of twenty tons: Held that this was not confined to boats carrying some loading, but that empty boats came within the meaning of the clause, and that for them toll was payable as on boats having a loading of twenty tons. Held, also, that the act having imposed different rates of toll on different goods carried along the canal, the tonnage on an empty boat was to be calculated at the lowest rate applicable to any species of goods. *Hollinshead v. The Leeds and Liverpool Canal Company*, M. 59 G. 3. Page 66

CARRIER.

A carrier is liable for gross negligence, although the goods are above the value mentioned in his public notice, and although they are not specially entered and insured. *Birkett v. Willan*, H. 59 G. 3. 356

CERTIORARI,

See RATE.

CHARITABLE USE,

See DEVISE, 3.

The owner of land having, at his

CHARTER-PARTY. 825

own expence, built a chapel, which was used for the purpose of public worship, and the congregation having subscribed a sum of money for the purpose of enlarging and improving the same, he, in consideration that the money so subscribed should be expended for that purpose, demised the premises by lease for twenty-three years, reserving a peppercorn rent, during his life, and 10*l.* per annum after his death. A declaration of trust was afterwards executed by some of the lessees, declaring that they would hold the premises in trust for the congregation assembling at the chapel, and that in case the public worship should be there discontinued, then, that they would assign the premises for civil purposes: Held that this was a conveyance for the benefit of a charitable use, and, therefore, void within the 9 G. 2. c. 36. s. 1. Held, also, that neither the sum agreed to be expended on the premises, nor the rent reserved at the death of the lessor, could be considered a full consideration paid for the lease, so as to bring the case within the 2d section of that statute. Held, also, that the declaration of trust, although executed only by some out of the several lessees, was evidence against all, of the purpose for which the lease was granted. *Doe, Dem. Wellard, v. Hawthorn*, M. 59 G. 3. Page 96

CHARTER-PARTY.

1. By charter-party the freighter covenanted to pay to the owner freight at and after the rate of so much per ton per month, for the term of six months at least, and so in proportion for less than a month, or for such further time than six months as the ship might

ten days next after her arrival there, and the remainder of the freight at specific periods: Held that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight, and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss. *Gibbon v. Mendez*, M. 59 G. 3. Page 17

2. By a charter-party a ship was described to be of the burden of 261 tons, and the freighter covenanted to load a full and complete cargo: Held that the loading of goods equal in number of tons to the tonnage described in the charter-party, was not a performance of this covenant; but that the freighter was bound to put on board as much goods as the ship was capable of carrying with safety. *Hunter v. Fry*, E. 59 G. 3. 421

3. By charter-party it was covenanted that the owner should receive on board, in *London*, all such goods as the freighter should desire to load, and should

in the chart did not ther for the voya session conti that he. the the cargo fo *Campion*, E

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A., being pos years in cer his whole in B., subject on the bre Held that condition by no reversion v. *Bateman*,

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See IX

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In a conviction c. 14. s. 3., stated, in in the eviden ing was at owner of the fore, where in the mem

CORONER.

on the subject, the conviction was held to be bad. *The King v. Daman*, H. 59 G. 3. Page 378

COPYHOLD.

1. Where there is no custom for that purpose, the lord of a manor cannot make a new grant of copyhold; and if he does, the grantee acquires thereby no settlement by estate. *The King v. The Inhabitants of Hornchurch*, M. 59 G. 3. 189
2. Where the lord of a manor, by copy of court-roll, granted A. the reversion of certain premises then in his tenure, to have and to hold to B. for his life, immediately after the death of A.: Held that B. might, on the death of A., maintain an ejectment, although he had never been admitted, he having acquired a perfect legal title by the grant, without admittance. *Roe, on Dem. Cosh, v. Loveless*, E. 59 G. 3. 453
3. It is a good custom in a manor that the steward or his deputy should have the sole right of preparing all the surrenders of copyhold tenements within the manor. *The King v. Rigge*, E. 59 G. 3. 550

COPYRIGHT.

The 54 G. 3. c. 156. does not impose upon authors as a condition precedent to their deriving any benefit under that act, that the composition should be first printed; and therefore an author does not lose his copyright by selling his work in manuscript before it is printed. *White v. Geroch*, H. 59 G. 3. 298

CORONER.

A coroner, under 25 G. 2. c. 29. s. 1. is not entitled to any compensation for the miles travelled by him in returning to his usual place of

COVENANT. 827

abode from taking an inquisition. *The King v. The Justices of Oxfordshire*, M. 59 G. 3. Page 209

CORPORATION.

See QUO WARRANTO, 1.

MANDAMUS, 1.

Where at a corporation meeting, for the purpose of electing honorary freemen, a list of names was proposed, upon the whole of whom the vote was taken collectively, instead of individually; held that such election was void, even where the corporation consisted of an indefinite number. *The King v. Player*, T. 59 G. 3. 707

COSTS.

Plaintiff having obtained a verdict, the Court on the application of the defendant, granted a new trial, on the ground that the Judge had misdirected the jury in point of law; but the rule for the new trial was silent as to costs. The defendant, without going to trial, gave the plaintiff a cognovit; and the Court held that the defendant was liable to pay the costs of the trial. *Jackson v. Hallam*, H. 59 G. 3. 317

COVENANT.

1. By charter-party the freighter covenanted to pay to the owner freight at and after the rate of so much per ton, per month, for the term of six months at least, and so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship in manner following, viz. so much as might be
S H 4 earned

earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods: Held that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight; and that the ship having been lost on her outward voyage the owner was not entitled to recover freight at so much per month to the day of the loss. *Gibbon v. Mendex*, M. 59 G. 3. Page 17

2. Covenant will lie by the assignee of the reversion of part of the demised premises against the lessee for not repairing. *Twynam v. Pickard*, M. 59 G. 3. 105

3. Where a lessee covenanted that he would at all times and seasons of burning lime supply the lessor and his tenants with lime at a stipulated price for the improvement of their lands and repair of their houses: Held that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied. *Earl of Shrewsbury v. Gould*, E. 59 G. 3. 487

CRIMINAL PROCESS,

See TRESPASS, 3.

COUNTY JUSTICES,

See JURISDICTION, 1.

COURT BARON, STEWARD OF.

See TRESPASS, 2.

CUSTOM,

See COPYHOLD, 1.

DEED.

DEED.

1. Where by a settlement in contemplation of marriage the children were given to trustees, for the use of such of the children, children of the body of the settlor, his intended wife, and his shares, &c. as he and his wife the survivor of them, should by deed or will appoint: Held that an appointment of the whole to one of the children by a widow was valid; and that the words "such shares, &c." did import that it was necessary to be divided, and some part appointed to each child. *Doe, Wilmett, v. Alchin*, M. 59 G. 3. Page 17

2. Where a marriage-settlement conveyed an estate to trustees for the use of settlor for life, then to the use of his wife for life, and then to the use of his first son and his heirs of such first son, and immediately after the termination of that estate for the use of his second, third, and every other son and sons, and their several and respective heirs, and for default of such issue to the use of all and every daughter and daughters, and their heirs, to take as tenants in common, and not as joint-tenants for want of such issue, then to the right heirs of the survivor of himself and his wife for life: Held that under these limits the sons took successively in fee tail, and the daughters an estate in fee. *Doe, Dem. Littleton v. Smeddle*, M. 59 G. 3.

3. Where husband and wife gave to trustees an estate, of which the wife's father was seized in fee simple, and afterwards, in the lifetime of the father, they levied a fine of the estate to the uses of the settlement: Held that after the father afterwards died, the

- the wife one of the co-heiresses : Held that her moiety of the estate became subject to the uses of that settlement, by reason of the fine, as an estoppel against the husband and wife and all persons claiming title under them. *Helps v. Hereford*, H. 59 G. 3. Page 242
4. No man can be allowed to allege his own fraud to avoid his own deed; and, therefore, where a deed of conveyance of an estate from one brother to another was executed to give the latter a colourable qualification to kill game : Held that, as against the parties to the deed, it was valid, and was sufficient to support an ejectment for the premises. *Doe, Dem. Roberts, v. Roberts*, H. 59 G. 3. 367
5. Where A., in a conveyance to uses, settled an estate for life on himself, remainder in tail to his issue, with an ultimate limitation to the heirs of S. R. in fee; and at the time of the settlement A. was himself the right heir of S. R.: Held that this ultimate limitation was void, and that the estate after the death A. without issue descended on his heirs general. Held, also, that it was not competent to go into the intention of the settlor, apparent from the recital, in order to explain the words of this limitation, they being words of plain and well-known import. Dissentiente, Bayley J. *The Marquis of Cholmondeley v. Clinton*, E. 59 G. 3. 625
6. A. by marriage-settlement, conveyed certain estates to trustees with remainder to his children of the marriage, share and share alike, as tenants in common; and for default of such issue, and if any of such children, there being more than one, shall happen to die without issue before twenty-one, that in every such case, the share of such child should go to

the survivors, as tenants in common; and in case all such children should die without issue, then to the use of the settlor in fee. Held, that there were no cross-remainders between the children of the marriage, except in the case of a child having died without issue, and under twenty-one. And that one of the children having died without issue, but after twenty-one, that his share vested in the settlor, and not in the survivor. *Meyrick v. Whishaw*, T. 59 G. 3. Page 810

DEVISE,

See POWER, 1.

1. Devise to trustees, their heirs, executors, administrators, and assigns, in trust, to let the freehold estates for any term they thought proper, at the best improved yearly rent, to pay one-third of the rents of the freehold estates to his wife for life, and one-third of the personalty to her absolutely, and then to lay out the other two-thirds of the personalty in the funds; and to pay the dividends and the rents of two-thirds of the freehold estates, and, after the death of the wife, the other third of the rent of the freehold estate to his daughter for her own separate use, and after her death the freehold estates and two-thirds of the personal estate to the daughter's children, to be equally divided amongst them, and to be paid them at the respective ages of twenty-one years; and if his daughter died without leaving issue, then his freehold estates to his wife for life, and after her death to his heir at law, as if he had died intestate: Held that the trustees took an estate in fee, and that upon the death of the widow, who was the surviving trustee, the legal

unmarried and without leaving lawful issue, then to his wife in fee. The daughter married and died under the age of 21 years, without issue; but left her husband surviving her: Held that the devise over did not take effect, as by the words of the will it was made to depend on the happening of the three events, dying under 21, dying under that age unmarried, and dying under that age without issue. *Doe, on Dem. Baldwin, v. Rawding*, E. 59 G. 3. 441

3. A testatrix after charging her estate with the payment of an annuity, devised the same to G. S., his heirs and assigns for ever; but her wish and desire was, that G. S., in his life-time, should convey the estate to some charitable uses, the choice of which was left entirely to his discretion; and subject to this, G. S. was to enjoy the estate to his own use for his life: Held that this was a devise void by 9 G. 2. c. 36., by which act, the estate given, and not merely the trust, was made void; and that the legal estate, upon the death of the devisee for life, descended on the heir at law. By the codicils to the will, certain legacies were bequeathed charged

1. Devise of with the n liberty tod under the not demise dultently c in ejectme suffered j fault. Th ment did n but the she of possessi of the tens of the preu ant, and als he had onl that, altho he recover in ejectme by his own self from ts that in an three years the statute landlord m rent in re demised i mines in only a libe The improve tioned in th is not the i a rent as t might fairl

that to attend the inheritance. *A.* having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the mean time taken of the term except that in 1801 the devisee in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for: Held that, under these circumstances, the jury were warranted in an ejectment brought for the premises by the heir at law to presume a surrender of the term. *Doe, on Dem. Burdett, v. Wright, T. 59 G. 3. P. 710*

3. The owner of the fee granted to *A.*, his partners, fellow-adventurers, &c. free liberty to dig for tin and all other metals throughout certain lands therein described, and to raise, make merchantable, and dispose of the same to their own use; and to make adits, &c. necessary for the exercise of that liberty, together with the use of all waters and water-courses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, and to convey any watercourse over the premises granted, habendum for twenty-one years; covenant by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c., and to work effectually the mines during the term; and then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor: Held that this deed did not amount to a lease, but contained a mere license to dig and search for minerals, and that the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee.

The grantee commenced working the mines, but after some time discontinued, not being prevented by the want of water, or any other inevitable accident. The grantor, after some lapse of time, verbally authorized other persons to dig for ore throughout part of the land described in the deed, and met those persons on part of the land, and pointed out the boundaries within which they were to exercise the liberty; and himself subsequently entered into a mining adventure with other persons, which was carried on within the limits described in the indenture; and afterwards in consideration of the surrender of the first grant, and of certain payments, demised the premises to a lessee for 21 years; and upon the execution of this lease, the original deed was delivered up, but there was no surrender in writing: Held that these acts amounted to a re-entry by the grantor, inasmuch, as unless referred to the exercise of that right, they would be acts of trespass by him. *Doe, on Dem. Hanley, v. Wood, T. 59 G. 3.*

Page 724

4. A term of years was created in 1762 and assigned over to a trustee in 1779, to attend the inheritance. In 1814 the owner of the inheritance executed a marriage-settlement; and in 1816 he conveyed his life-interest in the estate to a purchaser, as a security for a debt; but no assignment of the term or delivery of the deeds relating to it took place on either occasion. In 1819 an actual assignment of the term was made by the administrator of the trustee in 1779 to a new trustee for the purchaser in 1816: Held that under these circumstances on an ejectment brought by a prior incumbrancer against the purchaser, the

the jury were warranted in presuming that the term had been surrendered previously to 1819. *Doc, Dem. Putland v. Hulder, T. 59 G.3.* Page 782

EMBLEMENTS,

See TRESPASS, 1.

ENTRY,

See EJECTMENT, 3. FORFEITURE.

ESCAPE.

An attachment for non-payment of money is in the nature of mesne process; and where the party had been taken and permitted to go at large and returned again into custody, and continued in custody at the return of the writ; it was held that the sheriff was not liable to an action for an escape. *Lewis v. Morland, M. 59 G.3.* 56

EVIDENCE,

See PAYMENT, SETTLEMENT by Hiring and Service, 1. VARIANCE.

1. On an appeal the respondents in order to prove the fact of the delivery to them of a certificate given by the appellants, acknowledging the pauper to be their settled inhabitant, produced an old book from their own parish chest, in which was an entry of that fact in the hand-writing of a former parish officer. Held that such evidence was inadmissible. *The King v. The Inhabitants of Debenham, M. 59 G.3.* 185

2. In declaration for pirating a book, an allegation that plaintiff was the author of a book, being a musical composition, called *A.*, is well supported by shewing him to be the author of a musical composition of that name, comprised in and occupying only one page of a work with a different title, which contained several other musical

compositions. *White v. Gerack, H. 59 G.3.* Page 296

3. The contract laid in the declaration was to deliver stock on the 27th of February. The contract proved was to deliver stock on the settling-day, which, at the time, was fixed for, and understood by the parties to mean, the 27th of February. Held that the proof supported the declaration. *Wicker v. Gordon, H. 59 G.3.* 335
4. In an action for disturbance of plaintiff's right of common, the declaration stated that he was possessed of a messuage and land, with the appurtenants, and by reason thereof ought to have common of pasture, &c.: Held that this allegation was divisible, and that proof that plaintiff was possessed of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages pro tanto. *Ricketts v. Salwey, H. 59 G.3.* 360
5. Where a defendant, on being served with a declaration in ejectment, assented to the character of tenant in possession, and afterwards appeared and pleaded: Held that it was quite sufficient evidence for a jury to find that he was the tenant in possession, although it also appeared that he was in the situation only of a servant, and managed the business for the real owner on the premises. *Doc, on Dem. James, v. Staunton, H. 59 G.3.* 371
6. The law always presumes against the commission of crime; and, therefore, where a woman, twelve months after her first husband was last heard of, married a second husband, and had children by him; it was held, on appeal, that the Sessions did right in presuming prima facie that the first husband was dead at the time of the second marriage; and that it was incumbent

bent on the party objecting to the second marriage to give some proof that the first husband was then alive. *The King v. The Inhabitants of Twynning, Gloucestershire*, H. 59 G. 3. Page 386

7. Where an agreement on unstamped paper has been destroyed, no parol evidence can be given of its contents: even if it has been destroyed by the wrongful act of the party who takes the objection. *Rippiner v. Wright*, E. 59 G. 3. 478

8. Where, on trespass for pulling down a wall, the issue was, whether certain common land was the soil and freehold of the lord of the manor, on which the plaintiff was entitled to a right of common, or the soil and freehold of the plaintiff: Held that leases of minerals, &c. granted by the lord to other persons in other parts of the uninclosed waste lands were not receivable in evidence, unless it was first shewn that the locus in quo formed part of one entire waste, to which those leases were applicable.

Held, also, that the effect of such leases, if received, would only be to prove that the lord was entitled to the minerals under the locus in quo, and not to the surface. *Tyrwhitt v. Wynn*, E. 59 G. 3. 554

9. In a public navigable river 20 years' possession of the water at a given level, &c. is not conclusive as to the right.

A verdict obtained by the defendant in a former action, and which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but is only evidence to go to the jury. *Vooght v. Winch*, T. 59 G. 3. 662

10. A term of 1000 years was created

by deed in 1717, and in 1735 was assigned for the purpose of securing an annuity to A., and after that to attend the inheritance. A. having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the mean time taken of the term except that in 1801 the devisee in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for: Held that under these circumstances the jury were warranted in an ejectment brought for the premises by the heir at law to presume a surrender of the term. *Doc, on Dem. Burdett v. Wright*, T. 59 G. 3. Page 710

11. Declaration stated that defendant went before one R. C. Baron Waterpark of Waterfork, in the county, &c., and the proof was that he went before R. C. Baron Waterpark of Waterpark, in the county, &c.: Held that the allegation in the declaration was a description of a name of dignity, and therefore that this was a fatal variance.

In a count for slander: the words were, "This is my umbrella: he stole it from my back-door." The words proved were, "It is my umbrella, &c." And it appeared that these words were not spoken in the house where the umbrella then was: Held that the evidence did not support the declaration, inasmuch as the words laid imported to be spoken concerning a thing then present, and the words given in evidence were actually spoken concerning a thing not present at the time. *Walters v. Mace*, T. 59 G. 3. 756

12. Assumpsit on a promissory note, Plea, 1st, General issue. 2dly, Statute

Statute of limitations. There was no plea nor notice of set-off. It was proved, that on the plaintiff shewing the defendant the note within six years, the latter said, "You owe me more money, I have a set-off against it." Held, by *Bayley* and *Holroyd*, Justices, *Best*, J. *dissentiente*, that that was not a sufficient acknowledgment within six years, to take the case out of the statute of limitations. *Swan v. Sowell*, T. 59 G. 3.

Page 759

13. A term of years was created in 1762 and assigned over to a trustee in 1779, to attend the inheritance. In 1814 the owner of the inheritance executed a marriage-settlement; and in 1816 he conveyed his life-interest in the estate to a purchaser, as a security for a debt; but no assignment of the term or delivery of the deeds relating to it took place on either occasion. In 1819 an actual assignment of the term was made by the administrator of the trustee in 1779 to a new trustee for the purchaser in 1816: Held that under these circumstances on an ejectment brought by a prior incumbrance against the purchaser, the jury were warranted in presuming that the term had been surrendered previously to 1819. *Doe, Dem. Putland v. Hilder*, T. 59 G. 3.

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EXECUTION,

See PRACTICE, 21.

FACTOR.

The character of broker is materially different from that of factor; and therefore, where a broker sells goods without disclosing the name of his principal; held that he acts beyond the scope of his authority, and that the buyer cannot set off a debt due from the

FRAUDS, STATUTE OF.

broker to him against the demand for the goods made by the principal. *Baring v. Corrie*, M. 59 G. 3.

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FEEES,

See SHERIFF; PRACTICE, 85.

FINE,

See DEED, 3.

FISHERY,

See CONVICTION.

FIXTURES.

Certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant: Held that these were the goods and chattels of the outgoing tenant, for which he might maintain trover. *Davis v. Jones*, M. 59 G. 3.

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FORFEITURE.

A. being possessed of a term of years, demised his whole interest to B., subject to a right of re-entry on the breach of a condition: Held that A. might enter for the condition broken, although he had no reversion. *Doe v. Bate-man*, M. 59 G. 3.

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FRAUDS, STATUTE OF,

See LANDLORD and TENANT, 1.

A. had wrongfully, and without the licence of B., ridden his horse, and thereby caused its death: Held that a promise by a third person to pay the damage thereby sustained, in consideration that B. would not bring any action against A., is a collateral promise within the statute of frauds, and must be in writing. Held, also, that a motion

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tion for a new trial where the cause has been tried during the term may be made at any time within four days after the distringas is returnable. *Kirkham v. Marter, E. 59 G. 3. Page 619*

FREIGHT.

By charter-party the freighter covenanted to pay to the owner freight at and after the rate of so much per ton per month, for the term of six months at least, and so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter until her final discharge, or until the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship in manner following; viz. so much as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods: Held that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight, and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss. *Gibbon v. Mendez, M. 59 G. 3. 17*

FREIGHTER,

See CHARTER-PARTY, 3.

GIFT.

A verbal gift of a chattel, without actual delivery, does not pass the property to the donee. *Irons v. Smallpiece, E. 59 G. 3. 551*

HIGHWAY.

1. A bridge is not a highway within the meaning of the 13 G. 3. c. 84. s. 60. by which carriages employed in carrying materials for the repair of any turnpike road or public highway, are exempted from toll; and therefore toll is payable for a carriage employed in carrying materials for the repair of a bridge along a turnpike road. *Osmond v. Widdicombe, M. 59 G. 3. Page 49*
2. Where a local turnpike-act, after empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees out of the money arising by virtue of the act: Held that this only made the tolls an auxiliary fund in the hands of the trustees, and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for non-repair of the road.
Held, also, that such inhabitants may, after conviction, apply by motion for relief against the trustees under 13 G. 3. c. 84. s. 93.
Held, also, that 13 G. 3. c. 84. s. 63. only refers to diversions under writs of ad quod damnum, and under 13 G. 3. c. 78. s. 19. *The King v. The Inhabitants of Netherthong. M. 59 G. 3. 179*
3. Where a turnpike act exempted persons from toll "in going to and returning from their proper parochial church, chapel, or other place of religious worship on Sundays:" Held that the word "parochial" extended over the whole clause; and therefore that a Dissenter was not within the exemption in going to and returning from his proper place of religious worship, situate out of the parish in which he resided. *Lewis v. Hammond, M. 59 G. 3. 206*

INCLO.

INCLOSURE ACT.

By the general inclosure act the legal title to an allotment is not acquired until the execution and proclamation of the commissioners' award. And where a local act directed that the commissioners by notice might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors, and that the owners might fence their allotments after they had been marked, staked out, and confirmed, and before the signing of the award, and might also, within three months before the execution of the award, sell and convey their interests in the allotments, the commissioners being thereby authorized to allot to the purchasers, and the latter, after the execution of the award, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that where the allotments were copyhold, that the deed should be enrolled in the court-rolls of the manor, and that the purchaser should be admitted tenant thereto at the same time as the other allottees of copyhold lands, viz. after the execution of the award: Held that this authority to enclose and so to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given) be enjoyed and exercised without the legal seisin of the land; and that, therefore, these provisions, not sufficiently countervailing those of the general inclosure act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award. *Farrer v. Billing*, M. 59 G. 3. Page 171

INDICTMENT.

1. An indictment charged that defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof: Held that the gist of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and not necessary to set out the specific pretences. *The King v. Gill and Henry*, M. 59 G. 3. Page 206
2. A prosecutor of an indictment has no right to address the jury, and state the case for the prosecution. *The King v. Brice*, E. 59 G. 3. 606
The King v. Milne and Others ib.

INSURANCE.

1. In an action on a policy on ship, by which, amongst other risks, the underwriters insured against fire, and barratry of the master and mariners, they are liable for a loss by fire occasioned by the negligence of the master and mariners. Held, also, that where the assured had once provided a sufficient crew, the negligent absence of all the crew at the time of the loss was no breach of the implied warranty, that the ship should be properly manned. *Busk v. The Royal Exchange Assurance Company*, M. 59 G. 3. 73
2. A transport in government service was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was uneven, and on the tide having left her, she received damage by taking the ground: Held that this was a loss by a peril of the sea. *Fletcher v. Inglis*, H. 59 G. 3. 315
3. A ship insured at and from a port, sails on her voyage in an unseaworthy

thy state, in consequence of having a greater cargo than she could safely carry. The defect is discovered before any loss accrued, and part of the cargo is discharged, and a loss subsequently accrues, in no degree attributable to her having been overladen in the early part of her voyage: Held that the underwriters were liable for such loss.

The vessel having sailed and put back to the *Downs*, and then sailed again, and laboured and strained much from being overloaded, and then put back a second time; and upon an application to the underwriters for liberty for the ship to go into port to discharge part of the cargo, it was only communicated to them that the ship was too deep in the water: Held that as the subsequent loss had not in any degree arisen from her having so strained and laboured, the communication of that fact was immaterial, and that the communication made was quite sufficient.

Held, also, that the memorandum giving such liberty did not require a new stamp. *Weir v. Aberdeen*, H. 59 G. 3. Page 320

4. Policy on ship for four months, at and from a place to any port or ports whatsoever: Held that an open roadstead (being the usual place of loading and unloading) was a port within the meaning of this policy. *Cockey v. Atkinson*, E. 59 G. 3. 460

5. A ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas for the mere preservation of their lives; and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port: Held that such desertion of the crew did not of itself amount to a total loss; and, secondly,

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That the ship having been sold under the decree of the Admiralty Court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, that they had no right to abandon, and that there was no more than a partial loss. *Thornely v. Hebson*, E. 59 G. 3. P. 513

INTEREST,

See BANKRUPTCY, 5. AWARD, 4. BILL OF EXCHANGE, 7.

JUDGMENT.

A verdict obtained by the defendant in a former action, which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but is only evidence to go to the jury. *Vooght v. Winch*, T. 59 G. 3. 662

JURY,

See PRACTICE, 13.

JURISDICTION.

The 15 G. 2. c. 24. is a declaratory act, and should have a liberal construction. And therefore where justices of a borough, contributory to the county-rate, have committed prisoners to the county house of correction for offences cognizable within the county, the justices at their borough sessions, have a right to order such prisoners to be brought before them for trial there. *Quære*, also, where a county magistrate having concurrent jurisdiction, has committed a prisoner for an offence within the borough, whether the borough sessions have not the same power of ordering such prisoner to be brought before them for trial. *The King v. Amos*, E. 59 G. 3. 533

JUSTICE — Authority of

A justice of the peace is authorized
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to require surety of the peace for a limited time, according to his discretion, and need not bind the party over to the next sessions only. *Willis v. Bridger*, H. 59 G. 3. P. 278

LANDLORD AND TENANT,
See EVIDENCE, 4. PARTY WALL,
1. COVENANT, 3.

1. *A.* being tenant from year to year, underlet the premises to *B.*, and the original landlord, with the assent of *A.*, accepted *B.* as his tenant, but there was no surrender in writing of *A.*'s interest; rent being subsequently in arrear, the landlord distrained on *B.*'s goods: Held that these circumstances constituted a valid surrender of *A.*'s interest by act and operation of law within the 29 Car. 2. c. 3. s. 3. *Thomas v. Cook*, M. 59 G. 3. 119
2. Certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant: Held that these were the goods and chattels of the outgoing tenant, for which he might maintain trover. *Davis v. Jones*, M. 59 G. 3. 165
3. By the custom of the country the outgoing tenant was entitled to an allowance for foldage from the incoming tenant. Where a lease, however, specified certain payments to be made by the incoming to the outgoing tenant, at the time of quitting the premises, among which there was not included any payment for foldage: Held that the terms of the lease excluded the custom, and that the outgoing tenant was not entitled to any allowance in respect of foldage. Where the lease provided that the

tenant should during the term fold his flock of sheep which he should keep on the demised premises under a penalty if he omitted to do so. Held that this amounted to a covenant to keep a flock of sheep upon the premises. *Webb v. Plummer*, T. 59 G. 3. Page 746

4. Where a tenant came into possession of premises in 1816, and the lessor of the plaintiff claimed under a writ of elegit and an inquisition thereon issued in 1818, but founded on a judgment recovered prior to 1816; it was held that no notice to quit was necessary. *Doc. Dem. Putland, v. Hilder*, T. 59 G. 3. 782

LEASE,

See COVENANT, 2, 3. CONDITION,
1. EJECTMENT, 2. LANDLORD
AND TENANT, 3.

LETTER,

See STAMP, 3.

LIMITATIONS, STATUTE OF.

Assumpsit on a promissory note, Plea, 1st, General issue. 2dly, Statute of limitations. There was no plea nor notice of set-off. It was proved, that on the plaintiff shewing the defendant the note within six years, the latter said, "You owe me more money, I have a set-off against it." Held, by *Bayley* and *Holroyd*, Justices, *Best*, J. dissentiente, that that was not a sufficient acknowledgment within six years, to take the case out of the statute of limitations. *Swan v. Sowell*, T. 59 G. 3. 759

MANDAMUS.

1. The court will not grant a mandamus to a trading corporation at the instance of one of its members to compel them to produce their accounts for the purpose of declaring

ing a dividend of the profits. *The King v. The Governor and Company of the Bank of England*, E. 59 G. 3. Page 620

2. Where a railway was made under the authority of an act of parliament, by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of the same; the company having afterwards taken up the railway: Held that a mandamus might issue to compel the company to reinstate and lay down again the railway. *The King v. The Severn and Wye Railway Company*, T. 59 G. 3. 646

3. The mode of burying the dead is a matter of ecclesiastical cognizance: and therefore where the question was, Whether a parishioner had a right to be buried in the parish church-yard in an iron coffin, which was a new and unusual mode, the court refused a mandamus. *The King v. Coleridge and Others*, T. 59 G. 3. 806

MARRIAGE SETTLEMENT,

See DEED, 1, 2.

MONEY HAD & RECEIVED,

See PARTNERSHIP, 3.

OUTER DOOR, BREAKING OF,

See TRESPASS, 3.

PARTNERSHIP.

1. Where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained pos-

session of the original bills: Held that the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking under these circumstances the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. *Bedford v. Deakin and Others*, M. 59 G. 3. Page 210

2. Where one of two partners makes a contract as to the terms on which any business is to be transacted by the firm, although such business is not in their usual course of dealing, and even contrary to their arrangement with each other, and the business is afterwards transacted by or with the knowledge of the other partner: Held that he is bound by the contract made by his partner. *Sandilands v. Marsh*, T. 59 G. 3. 673

3. A. employed B. and C., who were partners as wine and spirit merchants, to purchase wine and sell the same upon commission. C. the managing partner, represented that he had made the purchases, and that he had sold a part of the wines so purchased at a profit; the proceeds of such supposed sales he paid to A., and rendered accounts, in which he stated the purchases to have been made at a certain rate per pipe. In fact, C. had neither bought nor sold any wine. The transactions were wholly fictitious, but B. was wholly ignorant of that. Upon the whole account a larger sum had been repaid to A., as the proceeds of that part of the wine alleged to be resold, than he had advanced; but the other part of the wine, which C. represented as having been purchased, was unaccounted for. Held that B. was liable for the false representations

sentations of his partner; and that *A.* was entitled to retain the money that had been paid to him upon these fictitious transactions, as if they were real.

Held, also, the supposed purchases having been represented to have been made at a certain specified rate per pipe, that *A.* might maintain an action for money had and received to recover the specific sums advanced for the number of pipes of wine unaccounted for. *Rapp v. Latham and Parry*, T. 59 G. 3. Page 795

PARTY WALL.

The assignee of the lessee of premises, at a fixed rent, which he considerably improved, and thereby rendered of greater annual value, is not the owner of the improved rent within the 14 G. 3. c. 78. *Lambe v. Hemans, E.* 59 G. 3. 467

PATENT.

Patent for "a new or improved method of drying and preparing malt." In the specification it was stated, that the invention consisted in exposing malt previously made to a very high degree of heat; but it did not describe any new machine invented for that purpose, nor the state, whether moist or dry, in which the malt was originally to be taken for the purpose of being subjected to the process; nor the utmost degree of heat which might be safely used; nor the length of time to be employed; nor the exact criterion by which it might be known when the process was accomplished: Held that the patent was void; inasmuch as, 1st, the specification was not sufficiently precise; and as, 2dly, the patent appeared to be for a different thing from that mentioned in the specification. Held, also, that as

the word *malt* was here not to be taken in its usual sense, viz. of an article used in the brewing, but only in the colouring of beer, that in the patent here it was necessary to have stated the purpose to which the prepared malt was to be applied, and to have said that it was obtained for a new method of drying and preparing malt to be used in the colouring of beer.

Quære, Whether a patent can be good if obtained for a mere process to be carried on by known implements or elements acting upon known substances; inasmuch as the word "manufacture," in 21 Jac. c. 3., seems rather to be confined either to some new article or to some new instrument, or part of an instrument, to be used in making an article previously well known: And held, that at all events no merely philosophical or abstract principle can answer to that word, or be the subject of a patent. *The King v. Wheeler, H.* 59 G. 3. Page 345

PAYMENT,

See BILL OF EXCHANGE, 5.

A bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor; one of the partners dies, and a new partner is taken into the firm; at that time a considerable balance is due from the obligor to the firm; advances are afterwards made by the bankers, and payments made to them on account by the obligor; the latter is credited by the new firm with the several payments, and charged with the original debt and subsequent advances as constituting items in one entire account, and the balance

lance due at the time of the partner's death is considerably reduced, and that reduced balance, by order of the obligor, is transferred by the bankers to the account of another customer, who, with his assent, is charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond: Held that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, that they were not at liberty so to treat it at a subsequent period; and that having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, that the bond was to be considered as paid.

Quære, Whether the transfer of the balance due from the obligor to the account of another, with his assent, did not, in point of law, operate as payment. *Bodenham v. Purchas*, M. 59 G. 3. Page 39

PAYMENT OF MONEY INTO COURT,

See PRACTICE, 1.

PERIL OF THE SEA,

See INSURANCE, 2.

PLEADING,

See TROVER, 3. EVIDENCE, 10. VARIANCE, 1, 2, 3.

1. In an action against several defendants, as ship-owners, for damage sustained by the loss of goods laden on board their ship, it was held that by the 53 G. 3. c. 159. s. 1., they were not liable in that character beyond the value

of the ship and freight, due or to grow due, although the loss was occasioned by the misconduct of one of the defendants, who was both master and part-owner; and, Secondly, That the value of the ship was to be calculated at the time of the loss, and not at the time of the commencement of the voyage; and,

Thirdly, That in calculating the value of freight, due or to grow due, money actually paid in advance was to be included. *Wilson v. Dickson*, M. 59 G. 3. Page 2

2. By charter-party the freighter covenanted to pay to the owner freight at and after the rate of so much per ton, per month, for the term of six months at least, and so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship in manner following, viz. so much as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods: Held that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight; and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per month to the day of the loss.

Gibbon v. Mendez, M. 59 G. 3. 17

3. An attachment for non-payment of money is in the nature of mesne process; and where the party had been taken and permitted to go at

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- large and returned again into custody, and continued in custody at the return of the writ; it was held that the sheriff was not liable to an action for an escape. *Lewis v. Morland*, M. 59 G. 3. P. 56
4. Covenant will lie by the assignee of the reversion of part of the demised premises against the lessee for not repairing. *Twynam v. Pickard*, M. 59 G. 3. 105
5. Declaration stated that plaintiff had sold to defendant a quantity of oak at the average price of the season, to be ascertained before a given day, and then averred that before that day the average price was ascertained to be a given sum. Held that the payment of money into court did not admit that the average price was that stated in the declaration. *Stoveld v. Brewin and Another*, M. 59 G. 3. 116
6. The character of broker is materially different from that of factor; and, therefore, where a broker sells goods, without disclosing the name of his principal: Held, that he acts beyond the scope of his authority, and that the buyer cannot set off a debt due from the broker to him against the demand for goods made by the principal. *Baring v. Corrie*, M. 59 G. 3. 137
7. Certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the out-going and in-coming tenant: Held that these were the goods and chattels of the out-going tenant, for which he might maintain trover. *Davis v. Jones*, M. 59 G. 3. 165
8. Where a sham plea was pleaded calculated to raise issues requiring different modes of trial, the court suffered the plaintiff to sign judgment as for want of a plea, and made the defendant or his attorney pay the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. *Thomas v. Vandermoolen*, M. 59 G. 3. Page 197
9. So also where the sham plea was such as to make it necessary for the plaintiff's attorney to consult counsel, and thereby cause delay and expence, the court suffered the plaintiff to sign judgment, and made the attorney pay the costs. *Bariley v. Godslake*, M. 59 G. 3. 199
10. An indictment charged that defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof: Held, that the gist of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and not necessary to set out the specific pretences. *King v. Gill and Henry*, M. 59 G. 3. 204
11. By the word *transportation* in the 8 G. 3. c. 15. is meant not merely the conveying of the felon to the place of transportation, but his being so conveyed and remaining there during the term for which he is ordered to be so transported; and therefore a felon attainted is not by that statute restored to his civil rights till after the expiration of the term for which he is ordered to be transported.
- 2dly, By attainder all the personal property and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown without office found; and therefore attainder may be well-pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainder. *Bullock v. Dodds*, H. 59 G. 3. 258
12. In

12. In declaration for pirating a book, an allegation that plaintiff was the author of a book, being a musical composition, called *A.*, is well supported by shewing him to be the author of a musical composition of that name, comprised in and occupying only one page of a work with a different title, which contained several other musical compositions. The 54 G. 3. does not impose upon authors as a condition precedent to their deriving any benefit under that act, that the composition should be first printed; and, therefore, an author does not lose his copyright by selling his work in manuscript before it is printed. *White v. Geroch*, H. 59 G. 3. Page 298.

13. The declaration stated that a bill of exchange was drawn and accepted at *Dublin*, viz. at *Westminster*, for a certain sum therein mentioned, without alleging it to be at *Dublin* in *Ireland*: Held that the bill upon this declaration must be taken to have been drawn in *England* for *English* money; and therefore proof of a bill drawn at *Dublin* in *Ireland* for the same sum in *Irish* money, which differs in value from *English* money, did not support the declaration, and that this was a fatal variance.

Held, also, the bill having been drawn for a certain sum *sterling*, that the omission of the word *sterling* in the declaration was immaterial. *Kearney v. King*, H. 59 G. 3. 301

14. An agent cannot dispute the title of his principal; and, therefore, where a ship originally belonged to one of two partners, and had been conveyed to *B.* for securing a debt, and *B.* became the sole registered owner of the ship, and afterwards, as agent for both partners, insured the ship and

freight, and charged them with the premiums, &c.; and, on a loss happening, received the money from the underwriters: Held that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged. *Dixon v. Hamond*, H. 59 G. 3. Page 310

15. A person having three bills of exchange, applied to a country banker, with whom he had had no previous dealings, to give for them a bill on *London* of the same amount, and the bill given by the banker was afterwards dishonoured: Held that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange.

Held, also, that if the exchange had not been complete, still that the banker having become a bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy, within the statute of *James*. *Hornblower v. Proud*, H. 59 G. 3. 327

16. The contract laid in the declaration was to deliver stock on the 27th of *February*. The contract proved was to deliver stock on the settling-day, which, at the time, was fixed for, and understood by the parties to mean, the 27th of *February*: Held that the proof supported the declaration. *Wickes v. Gordon*, H. 59 G. 3. 335

17. In an action for disturbance of plaintiff's right of common, the declaration stated that he was possessed of a messuage and land, with the appurtenants, and by reason thereof ought to have common of pasture, &c.: Held

that this allegation was divisible, and that proof that plaintiff was possessed of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages *pro tanto*, *Rickets v. Salwey*, Page 360

18. No man can be allowed to allege his own fraud to avoid his own deed; and, therefore, where a deed of conveyance of an estate from one brother to another was executed to give the latter a colourable qualification to kill game: Held that, as against the parties to the deed, it was valid, and was sufficient to support an ejectment for the premises. *Doe v. Roberts*, H. 59 G. 3. 367

19. In a conviction founded upon 5 G. 3. c. 14. s. 3., it must be distinctly stated, in the information and in the evidence, that the proceeding was at the instance of the owner of the fishery; and, therefore, where it was merely stated in the memorandum of a conviction that the proceeding was at the instance of such owner, and where the information, without containing any such allegation, concluded with a mere prayer of judgment on behalf of such owner, and the evidence was wholly silent on the subject, the conviction was held to be bad. *The King v. Daman*, H. 59 G. 3. 378

20. A note, whereby the maker promised to pay to A., or to B. and C., a sum therein specified, value received, is not a promissory note within the meaning of the statute of Anne. An action cannot be maintained at common law upon such an instrument, even by the payee against the maker, although it is stated on the face of the note to be given for value received. *Blunckenagen v. Blundell*, E. 59 G. 3. 417

21. A bond, with one surety only, taken by commissioners of taxes under the 43 G. 3. c. 99. s. 13., is not, therefore, void.

The office of collector under that act of parliament is an annual office; and, therefore, where a bond, after reciting the appointment of H. W. to be collector under the act, was conditioned for the due collection by H. W. of the rates and duties at all times thereafter, it was held that the due collection of the rates for one year was a compliance with the condition of the bond. And although it appeared from the condition of the bond that H. W. and G. P. were both appointed collectors, it was held that such bond, being for the due collection by H. W. only, might be put in suit against the surety without first selling the goods of G. P. *Peppin v. Cooper*, E. 59 G. 3. Page 431

22. The steward of a court baron is a judicial officer; and trespass will not lie against him where his bailiff by mistake took the goods of B. under a precept commanding him to take in execution the goods of A. *Holroyd v. Breare*, E. 59 G. 3. 473

23. Where a defendant covenanted that he would at all times and seasons of burning lime supply the plaintiff and his tenants with lime at a stipulated price for the improvement of their lands and repair of their houses: Held that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied. *Earl of Shrewsbury v. Gould*, E. 59 G. 3. 487

24. A verbal gift of a chattel, without actual delivery, does not pass the

the property to the donee. *Irons v. Smallpiece*, E. 59 G. 3.

Page 551

25. In the execution of criminal process against any man in the case of a misdemeanour, it is necessary to demand admittance, before the breaking of the outer door of the house can be legally justified. *Quære*, if so in the case of felony. *Launock v. Brown*, E. 59 G. 3. 592

26. *A.* had wrongfully, and without the licence of *B.*, ridden his horse, and thereby caused its death: Held that a promise by a third person to pay the damage thereby sustained, in consideration that *B.* would not bring any action against *A.*, is a collateral promise within the statute of frauds, and must be in writing. Held, also, that a motion for a new trial where the cause has been tried during the term may be made at any time within four days after the distress is returnable. *Kirkham v. Marter*, E. 59 G. 3. 613

27. In a public navigable river, 20 years' possession of the water at a given level, &c. is not conclusive as to the right.

A verdict obtained by the defendant in a former action, and which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but is only evidence to go to the jury. *Vooght v. Winch*, T. 59 G. 3. 662

28. Act of bankruptcy by lying two months in prison. During the imprisonment *A.* advanced to the bankrupt money for the purpose of settling with his creditors. The purpose failing, a part of the money was repaid to *A.* by the bankrupt: Held, that this repayment was protected, and that the assignees could not recover the money so

repaid. *Toovey v. Milne*, T. 59 G. 3. Page 683

29. Declaration alleged that before the publishing of the libel, a carriage, in which one *E. S.* was riding, was passing on a certain highway, and that plaintiff was there driving another carriage, and that it happened, without any negligence, fault, or furious driving on the part of the plaintiff, that the two carriages came in contact together, whereby the carriage in which *E. S.* was riding was overturned, and the said *E. S.* was injured. The declaration then proceeded to allege that the defendant published a libel of and concerning the plaintiff, and of and concerning the said accident, and that allegation was made in every count of the declaration. The defendant pleaded, 1st, Not guilty; 2dly, Justification to the whole of the libel in the first count of the declaration, and stated that the accident mentioned in the supposed libel was the same accident mentioned in the introductory part of the declaration, and that it was occasioned by the careless and furious driving of the plaintiff. The defendant then pleaded a justification only as to part of the libel contained in the second count, that the said *E. S.* had been thrown from a chaise, owing to the hard driving of the plaintiff; but there was no justification as to the other part. The jury found a verdict for the defendant on the justification; and they found a verdict for the plaintiff as to that part of the libel to which no justification was pleaded: Held that the word "accident" in this declaration meant the collision of the carriages only, and that the allegation that that collision was occasioned by the furious driving of the plaintiff, was a separate and dis-

distinct allegation, and that the verdict therefore was right. *Lord Churchill v. Hunt*, T. 59 G. 3.

Page 685

30. Trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery has occurred by mistake only. *Devereux v. Barclay*, T. 59 G. 3. 702

31. Declaration stated that defendant went before one R. C. Baron *Waterpark of Waterfork*, in the county, &c., and the proof was that he went before R. C. Baron *Waterpark of Waterpark*, in the county, &c.: Held that the allegation in the declaration was a description of a name of dignity, and therefore that this was a fatal variance. *Walters v. Mace*, T. 59 G. 3. 756

32. Assumpsit on a promissory note, Plea 1st, General issue. 2dly, Statute of limitations. There was no plea nor notice of set-off. It was proved, that on the plaintiff shewing the defendant the note within six years, the latter said, "You owe me more money, I have a set-off against it:" Held by *Bayley and Holroyd*, Justices, *Best*, J. *dissentiente*, that that was not a sufficient acknowledgment within six years, to take the case out of the statute of limitations. *Swan v. Sowell*, T. 59 G. 3. 759

33. A. employed B. and C., who were partners as wine and spirit merchants, to purchase wine and sell the same upon commission. C. the managing partner, represented that he had made the purchases, and that he had sold a part of the wines so purchased at a profit; the proceeds of such supposed sales he paid to A., and rendered accounts, in which he stated the purchases to have been made at a certain rate per pipe. In fact, C. had neither bought nor sold any wine. The transac-

tions were wholly fictitious, but B. was wholly ignorant of that. Upon the whole account a larger sum had been repaid to A., as the proceeds of that part of the wine alleged to be resold, than he had advanced; but the other part of the wine, which C. represented as having been purchased, was unaccounted for: Held that B. was liable for the false representations of his partner; and that A. was entitled to retain the money that had been paid to him upon these fictitious transactions, as if they were real.

Held, also, the supposed purchases having been represented to have been made at a certain specified rate per pipe, that A. might maintain an action for money had and received to recover the specific sums advanced for the number of pipes of wine unaccounted for. *Rapp v. Latham and Parry*, T. 59 G. 3. Page 795

POOR.

The pauper being a settled inhabitant of A., subsequently acquired a settlement in the township of B. The latter township afterwards ceased to exist as a place capable of maintaining its own poor: Held notwithstanding that the previous settlement in A. having been extinguished, the pauper could not be removed thither from a third town as to the place of his *last* legal settlement.

Quere, Whether in such a case a removal to the parish of which the township of B. formed a part would not be good. *The King v. Saughton on the Hill*, M. 59 G. 3. 162

POWER,

See DEED, 1.

1. M. P. devised all her lands, &c. in

- in *Westley*, in the county of S. to *A.* and his issue; and in default of issue to such uses as *A.* might by his will appoint: *A.*, by a will made in the life-time of *M. P.*, devises all his lands in the parish of *Worthen* and elsewhere, in the county of S., after several estates for life and in tail, to his own right heirs in fee; and afterwards, by a codicil made after the death of *M. P.*, revokes the devise of the reversion to his heir (in all other respects expressly confirming the will), and then devises the reversion in fee of all his said lands in the parishes of *Worthen*, *Westbury*, and *Cherbury*, in the county of S., to *B.*; *A.* had no other land in *Westbury*, except what he took under the will of *M. P.*: Held, however, that the power of appointment was not well executed by the codicil. *Powell v. Loxdale*, H. 59 G. 3. Page 291
2. *A.* by his will bequeathed to *R. S.* and *R. L. R.* a sum of money upon trust; and to *M. S.*, *R. S.*, and *G. A. D.*, certain personal property upon trust; and then devised his real property to *R. S.* and *G. A. D.*, also upon trust; and then directed that if either of his said trustees, the said *R. S.* and *R. L. R.*, so far as applied to the trusts reposed in them respectively, or the said *M. S.*, *R. S.*, and *G. A. D.*, so far as applied to the trusts reposed in them respectively as aforesaid, should decline to act, &c., it should be lawful for the survivor of the trustees so acting in the trusts wherein such vacancy should happen, or the executors or administrators of the last surviving trustee, to appoint other trustees: Held, first, that this power only extended to the two first classes of trustees, and not to the trustees of the real estate; held, secondly, that it was

not well executed by the two trustees, both of whom had wholly declined to act in the trust. *Sharp v. Sharp*, E. 59 G. 3. Page 405

PRACTICE,

See PLEADING, 8, 9. COSTS, 1.

1. Declaration stated that plaintiff had sold to defendant a quantity of oak at the average price of the season, to be ascertained before a given day, and then averred that before that day the average price was ascertained to be a given sum. Held that the payment of money into court did not admit that the average price was that stated in the declaration. *Stoveld v. Brewin and Another*, M. 59 G. 3. 116
2. An attorney, who had not practised on his own account since his last certificate expired, may be readmitted without paying any fine or arrears of duty. *Ex parte Clarke*, H. 59 G. 3. 314
3. The court will not set aside an attachment against the sheriff for not bringing in the body on payment of costs, on the application of the defendant, who swore to merits, where it appeared that no bail-bond had been taken by the sheriff. *The King v. The Sheriffs of London*, H. 59 G. 3. 354
4. Judgment signed after a summons for further time to plead is returnable, is irregular. *Morris v. Hunt*, H. 59 G. 3. 355
5. Waiver of irregularity. H. 59 G. 3. 373
6. Defendant is not entitled to an imparlance where he has by his own act prevented plaintiff from declaring within the term. *Page v. Vogel*, H. 59 G. 3. 390
7. A plea of comperuit ad diem on debt on bail-bond must be delivered. *Rowell v. Cox*, H. 59 G. 3. 392
8. A general plea of bankruptcy must be delivered, and not filed. *Henderson*

- erson v. Sansom, H. 59 G. 3. Page 392*
9. In an action on the 29 *Eliz. c. 4.* plaintiff is entitled to treble costs as well as treble damages. *Deacon v. Morris, H. 59 G. 3. 399*
10. A Judge's order directed that a cause should be referred, and that either party wilfully preventing the arbitrator from making an award by affected delay or otherwise, should pay such costs as the Court thought reasonable and just: Held that such order might be made a rule of Court after one of the parties had revoked the authority of the arbitrator. But, secondly, where the authority was revoked because the party could not procure the attendance of material witnesses before the arbitrator, the Court refused to allow any costs. *Aston v. George, H. 59 G. 3. 395*
11. A rule for a special jury must be served sufficiently early to enable the opposite party to strike the jury before the day of trial, and therefore, where the rule was served at six o'clock on the evening preceding the day fixed for the trial, it was held, that the cause was properly tried by a common jury. *Gunn v. Honeyman, H. 59 G. 3. 400*
12. The plaintiff's attorney directed the sheriff's officer, who had arrested the defendant, not to let him at large without an express consent from him, the attorney, as he had a lien for his costs. The sheriff's officer did, by the authority of the plaintiff in the action, but without that of the attorney, let the defendant go at large: Held that the sheriff was not liable to the attorney for his costs. *Martin v. Francis, H. 59 G. 3. 402*
13. Upon the trial of an indictment for a misdemeanor, which continued more than one day, the jury, without the knowledge or consent of the defendants, separated at night: Held that the verdict was not, therefore, void; and that it formed no ground for granting a new trial, it not appearing that there was any suspicion of any improper communications having taken place. *The King v. Kinnear & Others, E. 59 G. 3. Page 462*
14. The Court refused to set aside the verdict in ejectment, on the ground that there was a variance between the description of the premises in the nisi prius record (upon which the plaintiff recovered) and the issue; it not being stated how the premises were described in the declaration delivered. *Doe, Dem. Cotterill, v. Wyldc, E. 59 G. 3. 472*
15. Where the appeal is against the overseer's accounts by individuals paying rates within the parish, the certiorari is not taken away by 50 G. 3. c. 49.; that act only applying to appeals by the overseers against the disallowance of any items in their accounts by the magistrates. *The King v. Bird, E. 59 G. 3. 522*
16. Where an avowry stated that the defendant held the premises at certain yearly rent, to wit, the yearly rent of 72*l.* and the plaintiff pleaded, 1st, non tenuit; and, 2dly, riens in arrear; and the first plea was found for the plaintiff: Held that the second plea became thereby immaterial, and that the proper course was to discharge the jury from finding any verdict upon it, but that if any verdict was entered upon it, it must be entered for the plaintiff. *Cossey v. Diggon, E. 59 G. 3. 546*
17. A warrant of attorney to confess judgment is not void for omitting to state in the defeasance a collateral security for the same debt. *Sansom v. Goode, E. 59 G. 3. 569*
18. Bail-

18. Bail-bond stands as a security where a trial has been lost, notwithstanding the bail have rendered the principal. *Whitehead v. Philips*, E. 59 G. 3. Page 585
19. It is not necessary in case of a trial by proviso, after a lapse of four terms without any proceeding, to give a term's notice. *Theobald v. Crickmore*, E. 59 G. 3. 594
20. An affidavit to hold to bail, stating that defendant was indebted to plaintiff, for goods sold and delivered by the plaintiff for the defendant, is insufficient; because it did not appear that the goods were sold and delivered to the defendant. *Bell v. Thrupp*, E. 59 G. 3. 596
21. By rule of Court a cause and all matters in difference were referred to an arbitrator, and the costs of the cause were to abide the event. The arbitrator directed the verdict to be entered for the plaintiffs; but that they should not take out execution *for the debt* until they had paid a larger sum due to the defendant: Held that the plaintiff's attorney might still take out execution *for the costs*. *The Highgate Archway Company v. Nash*, E. 59 G. 3. 597
22. The assignee of a bail-bond without any sufficient reason for so doing, brought separate actions against each of the bail. The Court upon payment of the costs of one action only, stayed the proceedings in all. *Dissentiente Abbott C. J. Key v. Hill*, E. 59 G. 3. 598
23. Notice of bail was given by the defendant's attorney, and bail above put in by an attorney employed by the bail to the sheriff, without any order having been made to change the attorney: Held that this was sufficient. *The King v. The Sheriffs of London*, E. 59 G. 3. 604
24. A prosecutor of an indictment has no right to address the jury, and state the case for the prosecution. *The King v. Brice*, E. 59 G. 3. Page 606
The King v. Milne and Others, *Ibid.*
25. Entry of commititur in marshal's book is not necessary to make a perfect render. *The King v. The Sheriffs of Middlesex*, E. 59 G. 3. 607
26. Where a defendant, in an indictment for a misdemeanor, has received judgment of fine and imprisonment: a *levari facias* may issue immediately to take his goods in execution for the fine. *The King v. Woolf*, E. 59 G. 3. 609
27. A motion for a new trial where the cause has been tried during the term may be made at any time within four days after the *distringas* is returnable. *Kirkham v. Marter*, E. 59 G. 3. 613
28. The venue having been changed by the defendant, from *London* to *Staffordshire*, on the usual affidavit, the Court refused to bring back the venue to *London*, on an affidavit that the cause of action arose partly in *Staffordshire* and partly in *Worcestershire*, and that a material witness resided in *London*, and on the plaintiff's undertaking to give material evidence in one or other of those counties. *Wood v. Perkes*, E. 59 G. 3. 618
29. After the sheriff had returned *cepi corpus*, the plaintiff brought an action for an escape, and recovered the debt: Held, that he could not after this rule the sheriff to bring in the body. *Borwick v. Walton*, E. 59 G. 3. 623
30. It is no objection to the notice at the foot of a bill of *Middlesex* that it wholly omit to state the year or the word *next*. *Humphries v. Cullingwood*, E. 59 G. 3. 642
31. Where a cause was set down for

for the sittings in term and made a remanet to the sittings after term by consent, the defendant may move for judgment as in case of a nonsuit if the plaintiff afterwards withdraws the record. *Gadd v. Bennett*, T. 59 G. 3.

Page 709

32. A defendant, not privileged from arrest at the time, was arrested on an insufficient affidavit to hold to bail, and afterwards, on that ground, discharged, out of custody. During his imprisonment, another creditor, without collusion with the former, lodged a detainer against him: Held that such detainer was properly lodged. *Barclay v. Faber*, T. 59 G. 3. 743

33. More than one-sixth part of an attorney's bill having been taken off on taxation, the defendant presented a petition to the Vice-Chancellor to allow the costs of taxation. Pending this proceeding, the attorney brought his action for the residue of the bill: Held that the action was well brought; stat. 2 G. 2. c. 29. s. 23. having only prohibited an action being brought pending the reference and taxation. *Hewitt, One, &c. v. Bellott*, T. 59 G. 3. 745

34. Bail above having been put in and justified, the defendant pending a rule nisi for setting aside the allowance of such bail was rendered. The rule nisi being afterwards made absolute, an assignment of the bail-bond was taken. Held that such assignment was regular, the tender under such circumstances being insufficient. *Brown v. Jennings*, T. 59 G. 3. 768

35. The chief clerk is not entitled to poundage on money paid into Court by the Sheriff, under 43 G. 3. c. 46. s. 2. *Stewart v. Bracebridge*, T. 59 G. 3. 770

36. Where a long period had elapsed after judgment signed, and no de-

lays had been interposed by the defendant in the mean time, the Court will not permit the term in the declaration of ejectment to be enlarged for the purpose of the plaintiff's suing out a *scire facias*, in order to revive the judgment and take out a writ of possession. *Doe, Dem. Reynell, v. Rendall*, T. 59 G. 3. Page 773

37. An action was brought for two separate sums of money, one of which the defendant offered to pay with all costs to that time, the plaintiff's attorney refused to stay proceedings on those terms, and the defendant paid that sum into Court, but the plaintiff afterwards finding that he could not support the action for the other part of his demand, took the money out of court and discontinued the action; the Court, under these circumstances, allowed the defendant his costs from the date of his offer to pay the sum paid into court, and directed that the same should be set off against the plaintiff's costs. *James v. Raggett*, T. 59 G. 3. 776

38. Defendant pleaded two pleas requiring different modes of trial: Held, that on producing an affidavit of the falsehood of the pleas the plaintiff was entitled to sign judgment. *Bones v. Punter*, T. 59 G. 3. 777

PRINCIPAL AND AGENT.

1. The character of broker is materially different from that of factor; and, therefore, where a broker sells goods without disclosing the name of his principal; held that he acts beyond the scope of his authority, and that the buyer cannot set off a debt due from the broker to him against the demand for the goods made by the principal. *Baring v. Corrie*, M. 59 G. 3. 137

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2. An agent cannot dispute the title of his principal; and therefore where a ship originally belonged to one of two partners, and had been conveyed to *B.* for securing a debt, and *B.* became the sole registered owner of the ship, and afterwards, as agent for both partners, insured the ship and freight, and charged them with the premiums, &c.; and, on a loss happening, received the money from the underwriters: Held that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner to whom the ship originally belonged. *Dixon v. Hamond*, *H.* 59 G. 3. Page 310

POUNDAGE,

See PRACTICE, 35.

PRIVILEGE.

Where the question of privilege from arrest is doubtful the Court will not, upon motion, discharge the party out of custody, but leave him to his writ of privilege. *Quære*, Whether a gentleman of the king's privy chamber be privileged from arrest. *Luntley v. Battine*, *M.* 59 G. 3. 234

PROMISSORY NOTE,

See PARTNERSHIP, 1.

A note, whereby the maker promised to pay to *A.*, or to *B.* and *C.*, a sum therein specified, value received, is not a promissory note within the meaning of the statute of *Anne*. An action cannot be maintained at common law upon such an instrument, even by the payee against the maker, although it is stated on the face of the note to be given for value received. *Blanckenagen v. Blundell*, *E.* 59 G. 3. 417

PROMOTIONS, 1, 2. 241. 404. 645.

QUO WARRANTO.

1. It is a valid objection to a relator, applying for a quo warranto information, that he was present and concurred at the time of the objectionable election, even although he was then ignorant of the objection: for a corporator must be taken to be cognizant of the contents of his own charter, and of the law arising therefrom. The Court will not make such a rule absolute where a relator appeared to be a man in low and indigent circumstances, and there were strong grounds of suspicion that he was applying, not on his own account, or at his own expense, but in collusion with a stranger. *The King v. Trevenen*, *H.* 59 G. 3. Page 339
2. It is in the discretion of the Court to grant a quo warranto information or not; and under circumstances tending to throw suspicion on the motives of the relator, the Court will not grant such application where the consequence will be to dissolve a corporation. *Ibid.* *E.* 59 G. 3. 479

RATE.

1. The two districts of which a parish consisted had from the 43 *Eliz.* down to the 13 and 14 *Car.* 2., maintained their poor jointly, and at the time of the passing of the latter act agreed to separate in the maintenance of their poor, and that separate overseers should be appointed, upon condition that the rateable property in the parish, whether situated in the one or the other district, should be rated where the occupiers resided. In consequence of that agreement they had ever since uniformly maintained their own poor separately,

rately, and had had separate overseers, constables, &c. : Held that this clearly shewed that the parish, at the time of the agreement, could not reap the full benefit of the statute of *Eliz.*, and that, therefore, the separation of the two districts was valid, and that an appointment of overseers for the whole parish was now bad : Held, also, that the agreement consisted of two distinct parts, and that the invalidity of the latter part, as to rating property not situate within the district rated, did not affect the question on the former part. *The King v. Walsall*, *M.* 59 G. 3. Page 157

2. The expenses of a constable, in prosecuting an assault committed on him in the execution of his duty, cannot be paid by the overseer out of the poor's rate, and are not within the 18 G. 3. c. 19. s. 4. : Held, also, that where the appeal is against the overseers' accounts by individuals paying rates within the parish, the certiorari is not taken away by 50 G. 3. c. 49. ; that act only applying to appeals by the overseers against the disallowance of any items in their accounts by the magistrates. *The King v. Bird and Others*, *E.* 59 G. 3. 522

9. Where a canal was made under the 8th G. 3., which contained no clause as to the mode of charging it to the parochial rates, and another canal was made under the 23 G. 3. c. 92., and was therein directed to be rated in a special manner; and these two canals were incorporated by the 24 G. 3., by which it was provided that all the clauses, powers, provisions, restrictions, exemptions, &c. contained in each of the two former acts should still remain distinct from each other; and afterwards, by 58 G. 3. c. 19., reciting that it

REMOVAL.

was expedient to extend one system of management to the whole canal, it was enacted, "That all the canals so made as aforesaid under the former acts, or any of them, should be deemed part, parcel, and member of the *Birmingham Canal Navigations*, and be considered and included and governed by all the clauses, &c. in the 23 & 24 G. 3. (save and except so much thereof as related to exemptions from stamp duties, or the quantum of tolls to be collected,) as if the same had been described in the 23 G. 3., as part of the works to be made and done under and by virtue of that act : " It was held that this provision only incorporated these canals, &c. for the purpose of management, and that it did not authorise the canal originally made under the 8 G. 3. to be rated to the parochial taxes in the special manner pointed out by the 23 G. 3. *The King v. The Birmingham Canal Company*, *E.* 59 G. 3. P. 570

RECEIPT STAMP.

A receipt stamp is necessary where a paper contained acknowledgments at successive times of the payment of money. *Wright v. Sharrcross*, *E.* 59 G. 3. 501

REMOVAL.

The pauper, being a settled inhabitant of *A.*, subsequently acquired a settlement in the township of *B.* The latter township afterwards ceased to exist as a place capable of maintaining its own poor: Held, notwithstanding, that the previous settlement in *A.* having been extinguished, the pauper could not be removed thither from a third town as to the place of his last legal settlement. *Quere*, Whether in such a case a removal to the parish of which the

SETTLEMENT.

The 35 G. 3. c. 101. did not repeal 33 G. 3. c. 54. And, therefore, where an unemancipated daughter was delivered of a bastard child in the township of I. during her father's residence there, under a certificate acknowledging him to be a member of a Friendly Society, established under 33 G. 3. c. 54.: Held that such certificate extended not only to him, but to all the members of his family also; that the daughter, therefore, was at the time of her delivery residing in the township under the authority of 33 G. 3. c. 54., and that by sect. 25. of that act the settlement of the child followed that of the mother. *The King v. Idle*, M. 59 G. 3. 149

SETTLEMENT—*By Apprenticeship.*

1. The statute 51 G. 3. c. 80. extends to parishes where there are three officers only, one of whom acts as churchwarden as well as overseer; and, therefore, an indenture in such a case, signed by two parish-officers, one of whom acted in a double capacity, was held to be valid. *The King v. The*
- VOL. II.

*Inhabitants of St. Margaret's,
Leicester, M. 59 G. 3. Page 200*

2. Where a master mariner, having no immediate occasion for his apprentice's service, the vessel being then in dock, offered either to turn him over to another master for a time, or to let him go back to school, and the apprentice said he would go back to school and learn navigation; and accordingly did so, and resided above forty days there: Held that such residence was not a residence under the indentures, and that he did not thereby gain a settlement. *The King v. The Inhabitants of St. Mary Bredin, Canterbury*, H. 59 G. 3. 382
3. Where a pauper was bound apprentice to a certificated man, and during his apprenticeship, he being of the age of 18, his father gained a new settlement; and the pauper did not return to his father's house till after he was 21: Held that he was not emancipated, and that his settlement followed the new settlement of his father. *The King v. The Inhabitants of Huggate*, E. 59 G. 3. 582

SETTLEMENT—*By Estate.*

1. Where there is no custom for that purpose, the lord of a manor cannot make a new grant of copyhold; and if he does, the grantee acquires thereby no settlement by estate. And,
Secondly, a grant by the lord of copyhold land, paying a yearly rent of 2s. 6d. (which rent in a subsequent part was called a quit rent) is a purchase within 9 G. 1. c. 7., and being under 30l. confers no settlement. *The King v. The Inhabitants of Hornchurch, M.* 59 G. 3. 189
2. *J. F.* being seised in fee of a cottage, demised the same to the over-
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poor of the poor for 1000 years, reserving a pepper-corn rent, and continued to reside there. Being sick, his daughter and her husband came, by permission of the parish-officers, to reside with and take care of him: after his death, the daughter being his heir, they continued to reside there above 40 days, claiming a right to the possession: Held that they thereby gained a settlement, being entitled to the reversion, and the residence not being fraudulent. *The King v. The Inhabitants of Staplegrave*, E. 59 G. 3.

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SETTLEMENT — By Hiring and Service.

1. To make a valid contract of hiring and service, it is not absolutely necessary that the contract, when by deed, should be executed by the master; it is sufficient that he accepted the services on the terms of the deed; and, therefore, where a pauper executed a deed, by which he became bound to serve the master for a year, and afterwards entered into and continued in his service for that period, it was held that such deed, although not executed by the master, ought to have been received in evidence to shew the terms of the hiring. *The King v. Houghton le Spring*, H. 59 G. 3. 375
2. Where a pauper, being hired for a year, and having served till within a few days of the end of the year, went, without his master's leave, to the statutes to hire himself for the next year; and on the master dismissing him for that, went before a magistrate with his master, and there offered to serve his year out; but, upon receiving his full year's wages, was satisfied, and did not return to his service; but neither hired nor offered to

hire him till the year, that this pension remained he there. *The King v. Polston*
 3. A pauper from Old a month up the. Held that a year, thereby *Inhabita*

The sheriff than a fi rent issu sons, E.

1. In an s fendants mage s goods k it was h c. 159. liable in the valu due or t loss was conduct who wa owner;

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tion. There was a parol agreement between them that *C.* and *D.* should accept bills for the accommodation of *A.* and *B.*; that the ship should be a security to *C.* and *D.* for any advances they should make on such acceptances, and that until default made by *A.* and *B.* in providing for the acceptances, the ship should remain in their possession and management. The ship was registered in the names of *C.* and *D.*; but *A.* and *B.* remained in the possession and management of her, appeared to the world as owners, and obtained credit from appearing so. Before default made by *A.* and *B.*, in providing for the acceptances, *C.* and *D.* became bankrupts, and their assignees immediately seized and sold the ship. *A.* and *B.* afterwards became bankrupts. Held that trover for the ship could not be maintained by their assignees against the assignees of *C.* and *D.*, for the parol agreement could not be set up against the bill of sale, and the case did not come within the statute of *James*, the ship having been seized by the defendants before the bankruptcy of *A.* and *B.*; and though the bill of sale unaccompanied by possession might be void as against creditors, it was binding upon *A.* and *B.* and their assignees. *Robinson, v. McDonnell*, *M.* 59 G. 3.

Page 134

3. The 21 *Jac.* 1. c. 19. s. 11. is not repealed as to shipping by the ship-register acts; and, therefore, when *A.*, the owner of a ship, duly assigned his interest in it to *B.*, and *B.* became the registered owner, but, by his permission, *A.* continued to have the same in his possession, order, and disposition, until he became bankrupt: Held that the property in the ship

passed to *A.*'s assignees under the statute of *James*. *Hay v. Fairbairn*, *M.* 59 G. 3. Page 193

4. Where *A.*, having contracted for a ship to be built for him in the *East Indies*, agreed, during the time of the building, to sell a share to *B.*, and *B.* paid part of the price in pursuance of the agreement, and afterwards, on the ship's arrival in *England*, *A.* caused her to be registered, and accounted with *B.* as part-owner; but *B.*'s name was never on the register as part-owner: Held that *B.* had no legal interest in the ship. *Stringer v. Murray*, *H.* 59 G. 3.

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5. Where a ship registered at the port of *N.* was transferred by a deed of assignment to owners resident in *L.*, the ship being then in the port of *L.*: Held that this transfer was not within 34 G. 3. c. 68. s. 15., but within s. 16. of that act; and that the transfer was valid, although no indorsement was made on the certificate of registry. Held, also, that the non-compliance with 7 and 8 *W.* 3. c. 22. s. 21., does not avoid the transfer. *Hodgson v. Brown*, *E.* 59 G. 3.

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SLANDER,

See VARIANCE.

STAMP,

See EVIDENCE, 6. INSURANCE, 3.

1. By 55 G. 3. c. 184. s. 49., the commissioners of stamps are authorized to stamp letters of administration, *de bonis non*, on security given, and without payment of the duty, as well in cases where the duty has been paid on the original letters of administration, as when such letters of administration have been originally stamped

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ed on credit. *Doe v. Wood*,
T. 59 G. 3. Page 724

2. Where an agreement on unstamped paper has been destroyed, no parol evidence can be given of its contents: even if it has been destroyed by the wrongful act of the party who takes the objection. *Rippiner v. Wright*, E. 59 G. 3. 478

3. A letter from a principal to his factor, containing bills of exchange drawn upon the latter, and in which the principal promises to provide for the bills, if certain goods, then either in the factor's possession, or about to be placed in his hands, remain unsold, at the time of the bills falling due, requires to be stamped, and does not come within the exception of the stamp-act as a letter relating to the sale of goods; the primary object of such letter not being the sale of goods, but the obtaining of an advance of money on the goods. *Smith and Others v. Cator*, T. 59 G. 3. 778

SURETIES OF THE PEACE,
See JUSTICES, AUTHORITY OF, 1.

TAX-COLLECTOR,

See BOND, 2.

TERM, SURRENDER OF,

See EVIDENCE, 9. 11.

TOLL,

See CANAL, 1. HIGHWAY, 3.

TRANSPORTATION, MEAN-
ING OF.

1. By the word *transportation* in the 8 G. 3. c. 15. is meant not merely the conveying of the felon to the place of transportation, but his being so conveyed and remaining there during the term for which he is ordered to be transported;

and, therefore, a felon attainted is not by that statute restored to his civil rights till after the expiration of the term for which he is ordered to be so transported. *Bullock v. Dodds*, H. 59 G. 3. Page 258

2. By attainder, all the personal property and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown without office found; and, therefore, attainder may be well pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainder. *Ibid.* 258

TRESPASS.

1 By his induction the parson is put in possession of a part for the whole, and may maintain an action for a trespass on the glebe land, although he has not taken actual possession of it.

A parson who resigns his living, is not entitled to emblements. *Bulwer v. Bulwer*, T. 59 G. 3. 470

2. The steward of a court baron is a judicial officer; and trespass will not lie against him where his bailiff by mistake took the goods of B. under a precept commanding him to take in execution the goods of A. *Holroyd v. Breare*, E. 59 G. 3. 473

3. In the execution of criminal process against any man in the case of a misdemeanor, it is necessary to demand admittance, before the breaking of the outer door of the house can be legally justified. *Quære*, if so in the case of felony. *Launock v. Brown*, E. 59 G. 3. 592

TROVER,

See BANKRUPTCY, 2. GIFT, 1.

1. Certain parts of a machine had been put up by the tenant during his term, and were capable of being

being removed without either injuring the other parts of the machine or the building, and had been usually valued between the out-going and in-coming tenant: Held that these were the goods and chattels of the out-going tenant, for which he might maintain trover. *Davis v. Jones*, M. 59 G. 3. Page 165

2. A person having three bills of exchange, applied to a country banker, with whom he had had no previous dealings, to give for them a bill on *London* of the same amount, and the bill given by the banker was afterwards dishonoured: Held that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange. *Hornblower v. Proud and Others*, H. 59 G. 3. 327
3. Trover will lie for the mis-delivery of goods by a warehouseman, although such mis-delivery has occurred by mistake only. *Devereux v. Barclay*, T. 59 G. 3. 702

VARIANCE,

See BILL OF EXCHANGE, 3.
EVIDENCE, 3.

1. The declaration stated that a bill of exchange was drawn and accepted at *Dublin*, viz. at *Westminster*, for a certain sum therein mentioned, without alleging it to be at *Dublin* in *Ireland*: Held that the bill upon this declaration must be taken to have been drawn in *England* for *English* money; and therefore proof of a bill drawn at *Dublin* in *Ireland* for the same sum in *Irish* money, which differs in value from *English* money, did not support the declaration, and that this was a fatal variance.

Held, also, the bill having been drawn for a certain sum *sterling*, that the omission of the word

sterling in the declaration was immaterial. *Kearney v. King*, H. 59 G. 3. Page 301

2. The contract laid in the declaration was to deliver stock on the 27th of *February*. The contract proved was to deliver stock on the settling-day, which, at the time, was fixed for, and understood by the parties to mean, the 27th of *February*. Held that the proof supported the declaration. *Wickes v. Gordon*, H. 59 G. 3. 335
3. In an action for disturbance of plaintiff's right of common, the declaration stated that he was possessed of a messuage and land, with the appurtenants, and by reason thereof ought to have common of pasture, &c.: Held that this allegation was divisible, and that proof that plaintiff was possessed of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages *pro tanto*, *Ricketts v. Salwey*, 360
4. Declaration stated that defendant went before one *R. C. Baron Waterpark* of *Waterfork*, in the county, &c., and the proof was that he went before *R. C. Baron Waterpark* of *Waterpark*, in the county, &c.: Held that the allegation in the declaration was a description of a name of dignity, and therefore that this was a fatal variance.

In a count for slander, the words were, "This is my umbrella: he stole it from my back door." The words proved were, "It is my umbrella, &c." And it appeared that these words were not spoken in the house where the umbrella was: Held that the evidence did not support the declaration, inasmuch as the words laid imported to be spoken concerning a thing then present, and the words given in evidence were actually spoken con-

concerning a thing not present at the time. *Walters v. Mace*, T. 59 G. 3. Page 756

5. Declaration alleged that before the publishing of the libel, a carriage, in which one E. S. was riding, was passing on a certain highway, and that plaintiff was there driving another carriage, and that it happened, without any negligence, fault, or furious driving on the part of the plaintiff, that the two carriages came in contact together, whereby the carriage in which E. S. was riding was overturned, and the said E. S. was injured. The declaration then proceeded to allege that the defendant published a libel of and concerning the plaintiff, and of and concerning the said accident, and that allegation was made in every count of the declaration. The defendant pleaded, 1st, Not guilty; 2dly, Justification to the whole of the libel in the first count of the declaration, and stated that the accident mentioned in the supposed libel was the same accident mentioned in the introductory part of the declaration, and that it was occasioned by the careless and furious driving of the plaintiff. The defendant then pleaded a justification only as to part of the libel contained in the second count, that the said E. S. had been thrown from a chaise, owing to the hard driving of the plaintiff; but there was no justification as to the other part. The jury found a verdict for the defendant on the justification; and they found a verdict for the plaintiff as to that part of the libel to which no justification was pleaded: Held that the word "accident" in this declaration meant the collision of the carriages only, and that the allegation that that collision was occasioned by the furious driv-

ing of the plaintiff, was a separate and distinct allegation, and that the verdict therefore was right. *Lord Churchill v. Hunt*, T. 59 G. 3. Page 685

6. In an action of covenant, the declaration stated, that by a certain indenture it was witnessed that, as well in consideration of certain furnaces to be erected by the plaintiff, T. R. B. did demise, &c. The defendant pleaded *non est factum*. On producing the deed in evidence, it appeared to be, that as well in consideration of the erection of the furnaces, as also for building certain houses and payment of rent, T. R. B. did demise, &c. Held that this was a fatal variance. *Swallow v. Beaumont*, T. 59 G. 3. 765

VENDOR AND VENDEE.

1. By the usage of *Liverpool*, the vendor of goods was to pay warehouse rent for two months after the sale, if the goods remained there so long: Held, however, that where the vendor of such goods had, within the two months, given the usual order for delivery to the purchaser, the property in the goods from that time vested in the latter, and that he became responsible for all accidents which might happen to them, and that the circumstance of the goods having within that time been distrained for warehouse-rent, was an accident which must fall on the vendee, and such rent having been paid by the vendor's agent, in order to redeem the goods. Held that the latter could not recover the same from the vendor as money paid to his use. *Greaves v. Hepke*, M. 59 G. 3. 131
2. A tenant was bound either to consume the hay on the demised premises, or for every load of hay removed, to bring two loads of manure.

manure. On quitting possession of the premises, he sold part of a rick of hay then left standing to a purchaser, without mentioning his liability to bring manure. The in-coming tenant refused to allow the purchaser to take away the hay until the manure was brought. After an interval of a month, during which time the hay had been considerably damaged, the latter consented that it should be removed; the purchaser, however, then refused to accept or pay for the same. Held, that although the bringing on the manure was not a condition precedent to the carrying off the hay, as between the landlord and tenant, still, that after the tenant had quitted possession of the premises, the succeeding tenant had a right to refuse to permit the hay to be removed till after the manure was brought on; and that as the vendor had not enabled the purchaser

to remove the hay in the first instance, he was not entitled to recover the price. *Smith v. Chance*, T. 59 G. 3. Page 753

VENUE,

See PRACTICE, 27.

WAY.

The 13 G. 3. c. 78. s. 62. is applicable to proceedings by order of two justices under 55 G. 3. c. 68. s. 2.: Held, therefore, that it is necessary to give reasonable notice of the special sessions at which any such order is to be made to the several justices acting and residing within the division; and that unless such notices be given, the sessions ought not to confirm and enrol such order, even though there be no appeal against it. *The King v. The Justices of Worcestershire*, M. 59 G. 3. 228

END OF THE SECOND VOLUME.

